Supreme Court, U.S.
FILED
JAN 22 1990
JOSEPH F. SPANIOL, JR.
CLERK

89-1191

No. 89-___

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

SYLVIA EVANS, BERTHA BALARK, and
CURTIS COLLUM, individually and
on behalf of others similarly situated,

Petitioners,

v.

CITY OF CHICAGO,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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I. QUESTIONS PRESENTED FOR REVIEW

1. Whether a municipality in an equal protection challenge is entitled to a relaxed level of scrutiny and need not establish a rational relationship to the challenged classification?

2. Whether the law of the case doctrine requires that prior holdings be followed absent findings that the prior decision was both clearly erroneous and would work a manifest injustice?

3. Whether remand is necessary where the district court refrained from deciding a constitutional issue (due process) and the court of appeals reversed on the alternative constitutional ground relied upon (equal protection)?

4. Whether under the law of the case doctrine a court of appeals can apply a prior decision (*Evans I*) to a non-party (Collum)?

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No. 89-____

IN THE
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SYLVIA EVANS, BERTHA BALARK, and
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on behalf of others similarly situated,

Petitioners,

v.

CITY OF CHICAGO,

Respondent.

Petitioners Sylvia Evans,[1] Bertha Balark,[2] and Curtis

1. The Evans class includes: "All persons in whose favor a final tort judgment in excess of $1,000.00 against the City of Chicago has been or will have been entered commencing with the fiscal year 1972 and continuing to the date of the entry of final judgment in this case and payment of whose judgment is overdue by reason of the failure of the City of Chicago (a) to pay the judgment in full in the fiscal year it was entered or in full during the ensuing fiscal year in accordance with Ill.Rev.Stat. ch. 85, §9-104(a) or (b) to commence timely payment of installments on the judgment pursuant to Ill.Rev.Stat. ch. 85 §9-104(b) no later than the end of the first fiscal year following the entry of judgment. The class shall not include assignees or purchasers of judgments nor those persons who assigned, factored or "discounted" their judgments prior to full or partial payment by the City of Chicago." *Evans v. City of Chicago*, 689 F.2d 1289, 1290-91 n.6 (7th Cir. 1982) (App. 51).

2. The Balark class includes: "All persons in whose favor a final tort judgment in excess of $1,000.00 against the City of Chicago has been

Collum,[3] on behalf of their respective classes certified by the district court, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

II. OPINIONS BELOW

The opinion of the court of appeals (Appendix ("App.") 1-21) is reported at 873 F.2d 1007. The opinion of the district court (App.22-46) is unreported. The 1982 opinion of the court of appeals (App.47-71), which was reversed, is reported at 689 F.2d 1286. The first district court opinion in this case, on the City's motion to dismiss and certifying the classes, is reported at 522 F.Supp. 789.

III. JURISDICTION

The judgment of the court of appeals (App.72-73) was entered on April 27, 1989. A petition for rehearing with a suggestion for rehearing en banc was denied on August 25, 1989 (App.74-75). On November 14, 1989, Justice Stevens extended the time for filing a petition for writ of certiorari to

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or will have been entered commencing with the fiscal year 1974 who have held their judgments without full satisfaction thereof for a period not greater then the end of the fiscal year in which the judgment was obtained." *Evans v. City of Chicago*, 689 F.2d 1289, 1291 n.7 (7th Cir. 1982) (App.52).

3. The Collum class includes: "All persons in whose favor a final tort judgment in excess of $1,000.00 against the City of Chicago has been entered and who, commencing with the fiscal year 1974 assigned their tort judgments at a discount, prior to full or partial payment, in reliance upon defendant's policy and practice of delaying payments of judgments." *Evans v. City of Chicago*, 522 F.Supp. 789, 807- 08 (N.D.Ill. 1980).

and including January 22, 1990. The jurisdiction of this court is invoked under 28 U.S.C. §1254.

IV. CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

1. Section 1 of the Fourteenth Amendment of the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. Ill.Rev.Stat. ch. 85, §9-102:

> A local public entity is empowered and directed to pay any tort judgment or settlement for which it or any employee while acting within the scope of his employment is liable in the manner provided in this Article. A local public entity may make payments to settle or compromise a claim or action which has been or might be filed or instituted against it when the governing body or person vested by law or ordinances with authority to make overall policy decisions for such entity considers it advisable to enter into such a settlement or compromise.

3. Ill.Rev.Stat. ch. 85, §9-104:

> (a) If a local public entity does not pay the tort judgment or settlement during the fiscal year when it becomes final and if, in the opinion of its governing

body, the unpaid amount of the tort judgment is not too great to be paid out of revenues for the ensuing fiscal year, the governing body shall pay the balance of the judgment during the ensuing fiscal year.

(b) If the local public entity does not pay the tort judgment or settlement during the fiscal year when it becomes final and its governing body is of the opinion that the unpaid amount of the judgment or settlement is so great that undue hardship will arise if the entire amount is paid out of the revenues for the ensuing fiscal year, the governing body shall pay the judgment or settlement, with interest thereon, in not more than 10 annual installments. Each payment shall be of an equal portion of the principal of the tort judgment or settlement. The governing body, in its discretion, may prepay any one or more installments or any part of an installment.

V. STATEMENT OF THE CASE

A. *Evans I* District Court

In 1976 Sylvia Evans settled her wrongful death claim against the City of Chicago for $67,500 and judgment was entered against the City. In 1977 the Balarks (4) settled their civil rights action against several City of Chicago police officers for $18,000 and judgment was entered. Under Ill.Rev.Stat. ch. 85, §9-102 Illinois municipalities pay tort judgments entered against their employees who acted within the scope of their employment. In 1976 Curtis Collum and the City and several of its police officers agreed that Collum was to receive $17,500 in settlement of his civil rights claim and judgment was entered.

Evans, the Balarks and Collum were then placed on a waiting list for payment and learned that there was

substantial delay on the part of the City in paying tort judgments, especially those in excess of $1,000.00.[4] In reliance upon this lengthy delay Collum sold his judgment at a discount of 13 percent. *Evans v. City of Chicago*, 522 F.Supp. 789, 793 (N.D.Ill. 1980) ("*Evans*").

The City's delay in paying tort judgments out of the Tort Judgment Fund was the result of chronic underbudgeting of the Fund (even of known amounts from previous years), paying non-tort judgments in advance of tort judgments, and paying $1,000 and under tort judgments within 30 days. The City maintained that it could only levy $4.5 million in taxes each year to pay tort judgments, far less that the amount needed. This view was based, as the district court expressly observed and the *Evans I* court of appeals affirmed, on an erroneous interpretation of a state statute. This statute also memorialized a long standing practice of paying $1,000 and under tort judgments within 30 days. *Evans*, 522 F.Supp. at 801 n.10 and *Evans v. City of Chicago*, 689 F.2d 1289, 1299

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4. Petitioners presented evidence (Joint Exhibit 1) at the *Evans II* trial of the longest delays in payment for several years:

Year Judgment Was Paid	*Delay in Payment (in years)*
1977	6.04
1978	5.8
1980	7.78
1980	8.41
1981	5.93
1981	6.87
1982	5.52
1982	6.21
1983	6.09
1983	9.22
1984	5.44

Evans v. City of Chicago, 873 F.2d 1007, 1011 (7th Cir. 1989) (A.6) (delay of up to 9 years).

n.16 (7th Cir. 1982) (App.68) ("*Evans I*").

The City, then, only sold tax anticipation notes for 75% of the levy and refused to apply any other revenue to pay tort judgments. *Evans I*, 689 F.2d at 1290 (App.50). Meanwhile, other tort judgments of $1,000 and less were paid out of the Tort Judgment Fund within 30 days and other judgment creditors were paid from other City funds within 30 to 150 days. *Evans v. City of Chicago*, 873 F.2d 1007, 1010 (7th Cir. 1989) (App.6) ("*Evans II*").

Evans filed suit in 1977 against the City of Chicago and the Balarks and Collum followed in 1979, all under 42 U.S.C. §1983, all challenging the City's policy of delaying payment of tort judgments. Each petitioner raised claims under the United States Constitution for equal protection (that some tort judgments and non-tort judgments were paid quicker) and due process (that petitioners have a property interest in their judgments and that the municipal policy, vis-a-vis Ill.Rev.Stat. Ch. 85, §9-104, deprived each of this right without due process) violations. Collum also sought a declaratory judgment that Ill.Rev.Stat. ch. 85, §9- 104 was unconstitutional as applied and on its face in violation of the Due Process Clause. The Balarks sought declaratory relief that the defendant's policy violated equal protection and due process. Each petitioner sought class certification and in 1980 each was granted class status. *Evans*, 522 F.Supp. at 803-10. The original jurisdictional basis for each action is 28 U.S.C. §§1343(3), 1343(4), 1331, 2201 and 2202.

On the City's motion to dismiss the Balark and Collum actions, the district court (Grady, J.) held that petitioners stated a due process claim: that the tort judgments were a protectable property interest, *Evans*, 522 F.Supp. at 797, and that §9-104 appeared to have no protective procedures against abuses of discretion by the City in paying tort judgments at any time. [5] *Id.* at 800.

Petitioners Balark and Collum raised several equal protection claims: that the City paid contract claims and tort judgments of $1,000 and less quicker than tort judgments over $1,000 and did not pay tort judgments in their order of entry. The City admitted that judgments of $1,000 and under were paid within 30 days and that judgments over $1,000 must wait up to 4 1/2 years for payment. *Id.* at 802. To justify this policy, the City asserted that they were trying to "satisfy the small judgments at the earliest possible time." *Id.* The district court held that petitioners stated an equal protection claim because the City had not offered a rational basis for the policy of prioritizing small judgments. *Id.* at 803.

On petitioners' subsequent motions for partial summary judgment, the district court directed the City to immediately pay all unpaid Evans class members, declared that §9-104(b) violated due process, enjoined the City from paying tort judgments of $1,000 and less before earlier entered (larger) judgments and held that the practice violated equal protection. *Evans I*, 689 F.2d at 1291 (App.53-54).[6]

B. *Evans I* Court of Appeals

Petitioners Evans and Balark filed a timely appeal and the City cross-appealed.[7] The City's appeal challenged the

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5. Other holdings in that opinion are not relevant to this petition.

6. The district court made several other holdings not relevant to the case at this juncture.

7. Petitioner Collum did not appeal the decision. Petitioners Evans and Balark challenged the court's refusal to hold §9-104(a) unconstitutional on its face. The court of appeals held the challenge to 9-104(a) was not properly before them at that time because the district court did not make its ruling final under Rule 54(b). 689 F.2d at 1291-92 (App.54). At no time upon remand did plaintiffs abandon this claim and in fact pursued it strenuously. *See* note 17, *infra*. The other issue raised by petitioners in *Evans I* is not relevant to this action now.

district court findings of a property right, 9-104(b)'s unconstitutionality, and equal protection violations.[8] The court of appeals affirmed that petitioners' tort judgments were, under Illinois law, a property right, 689 F.2d at 1296-97 (App.62-65), but vacated the finding of a due process violation under §9-104(b) because the City never invoked that provision (to pay in installments). 689 F.2d at 1298-99 (App.67-68).

On equal protection the court of appeals applied the rational basis test, *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), and held the City's justification for the prioritization policy (an attempt to reduce litigation and interest costs by encouraging quick settlements for $1,000 or less) deficient because the City also gave priority payment to fully litigated claims of $1,000 or less. Further, the practice did not reduce interest costs "since interest accumulated on the sum of the unpaid judgments." *Evans I*, 689 F.2d at 1299 (App.69). The court of appeals also held that this policy did not "allow the City [to] more effectively manage its yearly appropriations and limit the City's debt." 689 F.2d at 1299-1300. (App.69). In sum, the court of appeals could "*discern no rational basis for the City's challenged classification.*" 689 F.2d at 1300 (App.69) (emphasis supplied). Certiorari was not sought by any party.

C. *Evans II* District Court

At trial on damages, the district court (Grady, C.J.) sought additional evidence on equal protection violations to support the damages claims. Following a two week bench trial, the court found:

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8. Other issues not relevant to this petition were also raised by the City.

1. that the City did not pay tort judgments within the year in which the judgment was entered,

2. that the City did not pay tort judgments in the ensuing year,

3. that the City did not pay tort judgments in 10 annual installments,

4. that the City did not pay tort judgments in accord with any state statute or municipal ordinance,[9] and

5. that the City made no attempt to adequately budget money to pay tort judgments over $1,000.

(App.23) In short, the City simply "ignore[d] the requirements of law with regard to when [over $1,000] judgments should have been paid." (App.23)

On the legal questions, first due process, the district court specifically held that it would not reach that constitutional question because it had an adequate, alternative constitutional ground for its decision and the long standing principal of avoiding decisions on unnecessary constitutional issues required restraint. (App.27-28).

> I do not reach the question of whether the City's practice of paying judgments at times beyond 60

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9. In fact, City of Chicago Municipal Ordinance 7-29 requires payment in order of entry:

> All judgments shall be paid in the order of the date of entry upon the records of the court; provided, that if after the comptroller has sent notice by registered mail to the judgment creditor or his attorney of record that suchclaim is ready for payment and such judgment creditor fails to present such judgment, with satisfaction piece, for payment within fifteen days, then judgments next in the order of entry shall be paid.

> days after their entry and up to the end of the ensuing fiscal year violates due process, nor do I reach the question of whether Section 9-104(a) is facially violative of either due process or of equal protection (because petitioners also suggest that to the extent that Section 9-104(a) classifies tort judgments in a manner different than other kinds of judgments, it violates equal protection). I do not reach those questions. (App.28)

On the equal protection claim, the district court found:

- that tort judgments of $1,000 and under were paid within 30 days;
- the majority of non-tort judgments were paid within 30 to 150 days after demand for payment;
- that contract judgments were paid from line item accounts in the general corporate fund for that department unless insufficient funds were available then the judgment was paid from the general corporate fund (either way within 30 to 150 days);
- that judgments against departments considered enterprise accounts (e.g., Water Department, airport, etc.) were paid out of the funds collected by the department;
- that judgments for employment discrimination and *Shakman* violations (political hirings/firings) were paid out of the particular department and not the tort judgment fund;
- that the delay for payment of tort judgment holders (over $1,000) was "up to five years or more;" and
- that the City chronically underbudgeted, failed to levy and collect sufficient taxes to pay judgment creditors. (App.29-30, 36)

Following *Evans I* as the law of the case, the district court applied the rational basis test and rejected the justifications the City asserted for the classifications after determining that there was no rational basis for the distinction between the petitioner classes and these other judgment creditors.

The district court rejected the City's justification "that this was a good way to satisfy more people," (App.31), stating that "[i]f that kind of analysis were a valid equal protection argument, then . . . all of the Jim Crow laws that existed in the South in days gone by could have been justified on the basis that they were really making more people happy than they were making unhappy." (App.32)

Second, the district court found no fault with the City's "fund accounting"[10] practice, but found that the system was not practiced by the City. No explanation was offered by the City as to why sidewalk fall-down judgments (over 50 percent of the tort judgments paid from the Tort Judgment Fund) are not charged to the Streets Department and why police misconduct judgments are not charged to the Police Department. (App.32-35)

The district court also found the City's chronic underbudgeting of the Tort Judgment Fund violative of the Constitution as well:

> [To argue i]t can arbitrarily select a favored group, pay that favored group or render whatever kind of valuable service to that favored group it chooses to render and then deny similar treatment to other persons on the ground that the money is gone, it has no

10. "Fund accounting" is the system by which judgments are charged back to the department from which the claim originated.

> more money . . . simply cannot pass muster if the concept of equal protection is to have any substance. (App.36)[11]

In sum, the district court held that "there is *no principled way in which one can arrive at the conclusion that a rational distinction can be made* between the tort judgments owned by the petitioners in this case and other judgments to which the City gave preference on the various theories I have just discussed." (App.35) (emphasis supplied). [12]

D. *Evans II* Court of Appeals

The City filed a timely appeal and sought review of both the district court findings and *Evans I*. The Collum class cross-appealed on damages. The court of appeals reviewed the lengthy case history and the district court holdings, then addressed the law of the case doctrine and *Evans I*, and endeavored to determine if *Evans I* was "wrongly decided." *Evans II*, 873 F.2d at 1007, 1009-13 (App.2-12).

The court examined *Evans I* and the City's justifications presented there. The court found them to not be "a civics textbook example of good government," 873 F.2d at 1015 (App.17), but determined that any delving into this equal protection claim would result in judicial meddling into legislative province. Based on this, the court reversed *Evans I* because it was "clearly erroneous." 873 F.2d at 1016

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11. The district court also held that insufficient evidence was presented to support an equal protection claim based upon payment of tort judgments out of order. (App.36-37).

12. The district court then determined the formulas for damages calculation for each class. The total damages, though not exactly calculated, were estimated at several million dollars, to be divided by the thousands of class members.

(App.18).

On equal protection post-*Evans I*, the court focused on two findings from the *Evans II* trial: (1) "that the City was obligated by the equal protection clause to establish a single order of payment for all judgments of any kind entered against the City," and (2) "the City was obligated to raise sufficient revenues through taxation to allow it to pay all tort judgments from the [Tort Judgment] Fund as promptly as it paid other judgments." 873 F.2d at 1014-15 (App.15). *See also* 873 F.2d at 1016 (App.18).

The court held the goal of pleasing more tort judgment creditors not "impermissible," although not "laudatory" either, and thus legitimate. 873 F.2d at 1016 (App.17). The court held that "fund accounting" in only some departments rational because it is a rational approach to accounting, 873 F.2d at 1017 (App.19-20), and labelled it a mere "lack of symmetry in its policy." 873 F.2d at 1017 (App.20). Thus, the court of appeals reversed *Evans I* as clearly erroneous and the *Evans II* district court opinion as too demanding and "not warranted under the rational basis test." 873 F.2d at 1017-18 (App.20-21).

The court also addressed the due process claim:

- "This court will follow the lead of the *Evans I* court and refrain from expressing any opinion on the constitutionality of the statute." 873 F.2d at 1011 n.8 (App.8);
- "The *Evans II* district court found no due process violations and the due process issue was not argued by the parties on this appeal." 873 F.2d at 1012 n.11 (App.9); and
- "There is some question as to what effect we must give to the due process language in *Evans I*. *See supra*, note 11. The district court in *Evans II*, while acknowledging the due process findings in *Evans I*, did not base its holding on any due process violation. The district court decided this

case solely on equal protection grounds and damages were awarded on that basis alone. The parties to this appeal also did not raise any issue of due process. The due process claim has not survived to this stage of the litigation." 873 F.2d at 1018 n.15 (App.21).

VI. REASONS FOR GRANTING THE WRIT

The issues presented by this case are of substantial significance to municipal tort judgment creditors, the proper and effective administration of municipal tort judgment debts, and judicial review of procedures exercised to effect collection. The holding of the Court of Appeals of the Seventh Circuit is in conflict with a decision of the Fifth Circuit on the important issue of whether or not an equal protection claim can be stated against a municipality with respect to its method and manner of paying tort judgments.

The Seventh Circuit Court of Appeals' application of the test for equal protection violations by a municipality and the test for the law of the case doctrine are at variance with the standards adopted by this Court. The court of appeals incorrectly allowed a municipal ordinance to have a "legitimate purpose" when it conflicted with a state statute. In addition, the court of appeals applied the law of the case doctrine to a non-party to the prior action (rather than applying collateral estoppel).

The court of appeals' failure to remand on the constitutional issue not reached by the district court is inconsistent with this Court's decisions supporting judicial restraint on unnecessary constitutional issues.

The decision of the court of appeals thus raises issues of substantial importance that should be resolved by this Court.

1. The court of appeals has failed to follow the decisions of this Court and is in conflict with the Fifth Circuit

regarding the application of equal protection analysis to municipal tort judgment payment practices. This conflict raises the important question of whether or not federal courts will continue to review municipal creditors' claims (federal and/or state final judgment holders) when effective collection of municipal judgments is impaired by municipal policy.

This Court and other federal courts have on many occasions reviewed claims of municipal judgment creditors who were unable or impaired in their collection procedures, an issue significant to municipal administration in the originating jurisdiction and nationwide. In these cases, this Court and other federal courts have scrutinized the municipal practices to determine if they comport with state, federal and constitutional law. As early as 1885 this Court addressed the problem of collection of judgments entered against a municipality. This Court examined Louisiana state law collection procedures and determined that the petitioner had properly brought an action against the City of New Orleans for collection. *Canal and Claiborne Streets Railroad Company v. Hart*, 114 U.S. 654 (1885). Other decisions of this Court similarly examined the problems creditors faced when municipalities failed to pay judgments. In that same year this Court reviewed a debt claim against the City of Quincy, Illinois, where the municipality refused to levy taxes to raise revenue to pay the judgment. *Quincy v. Jackson*, 113 U.S. 332 (1885). This Court held that if the law allows further taxation to cover the debt, then the municipality must levy taxes and pay the judgment.

Subsequent litigation in the lower courts has also examined and determined the validity of creditors' claims and municipal judgment payment practices. *United States ex rel. Kilpatrick v. Capdevielle*, 118 F. 809, 814 (5th Cir. 1902), *cert. denied* 189 U.S. 510 (1903) (court reviewed claim of municipal debt and required the City of New Orleans to apply unused taxing power to pay indebtedness); and

Clearwater County v. Pfeffer, 236 F. 183 (8th Cir. 1916) (court refused to allow collection of municipal judgment by levying on county funds in a bank, but ordered county to turnover funds in its control to the creditor). More recently, the Seventh Circuit also examined tort judgment collection claims against municipalities which impeded or refused to make payment. *Balark v. Curtin*, 655 F.2d 798 (7th Cir. 1981) (judgment creditor was not limited in garnishing city employee where city was indemnitor of claim and Tort Judgment Fund payment was slower); and *Lenard v. Argento*, 838 F.2d 1483 (7th Cir. 1988) (both city and insurer were liable for judgment entered against municipal employee for civil rights violation).

Recent litigation also continues in the Fifth Circuit over collection of judgments against reluctant Louisiana municipal corporations. *Minton v. St. Bernard Parish School Board*, 803 F.2d 129 (5th Cir. 1986) (plaintiff stated an equal protection claim where differential payment methods were applied to similarly situated tort judgment holders) and *Bruno v. City of New Orleans*, 724 F.Supp. 1222 (E.D.La. 1989) (City's motion to quash writ of execution on outstanding tort judgment granted).

This Court and lower federal courts consistently examine the problems in collection of judgments against municipalities. The court of appeals in this case, however, refused to examine (other than superficially) the City's allegedly arbitrary and capricious payment system challenged under the equal protection clause. The court of appeals singled out the district court finding that the City must raise more tax revenues, 873 F.2d at 1014-16 (App.15-18), but ignored the district court's prior edict that the City should not, even with limited funds, favor one judgment holder over another. Phrased in either manner, the issue is one that federal courts have routinely examined. The court of appeals' decision disassociates this important task from federal court scrutiny.

The Seventh Circuit's holding in *Evans II* genuinely eliminates the possibility of an equal protection claim against a municipality for unequal treatment of similarly situated tort judgment (including federal judgments) creditors (let alone all creditors). The court gave wide deference to the City applying an "extremely deferential standard," 873 F.2d at 1016 (App.17), such that even the admittedly unequal treatment of similarly situated tort judgment creditors above and below $1,000 was sustained.

The Fifth Circuit held to the contrary in *Minton v. St. Bernard Parish School Board*, 803 F.2d 129 (5th Cir. 1986), where the defendant school board refused to appropriate funds sufficient to pay petitioner's tort judgment because petitioner was not a resident of St. Bernard Parish. The due process and equal protection claims were dismissed in the district court. On appeal the court held that under equal protection the petitioner stated a claim, although it was unclear what subsequent justification the Parish would raise. The court affirmed dismissal of the due process claim under Louisiana law.

Review of the decision in this case is warranted to settle this important question of the role of the federal courts and resolve the conflict presently existing.

2. This Court, in applying the equal protection clause to governmental decisions, see *Quinn v. Millsap*, 491 U.S. ___, 109 S.Ct. 2324 (1989), examines whether the classification is rationally related to a legitimate state interest. *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 440 (1985). The test is not limited to whether the legitimate state interest is rational, but includes two-tiers: first whether the purpose is legitimate **and** second whether the classification is rationally related to the legitimate purpose. *Zobel v. Williams*, 457 U.S. 55, 60 (1982) and *Hooper v. Bernalillo County Assessor*, 472 U.S. 612, 620-23 (1985).

The court of appeals deviated significantly from this test in two respects, first applying only one-tier (the rational, legitimate purpose) and second in applying a more deferential standard towards municipalities.[13]

a. Petitioners, in toto, have presented and proven six separate equal protection classifications and violations: one in *Evans I* ($1,000 and under versus over $1,000 tort judgments) and five in *Evans II* (see Statement of the Case, *ante* at 11). The City has presented four separately stated grounds to justify the challenged classifications: two in *Evans I* (to reduce litigation and interest costs by encouraging quick settlements for $1,000 or less without interest) and two in *Evans II* (to accommodate large numbers of small tort judgment creditors thereby reducing the number of persons waiting for payment and fund accounting).

In *Evans I* the court of appeals not only found the justifications frivolous (this in fact does not save the City money), but stated that it could "discern no rational basis for the City's challenged classifications." 689 F.2d at 1300 (App.69). The first of the City's *Evans II* justifications is merely a restatement of the rationale rejected in *Evans I*. Both justifications are intended to appease more persons than the City otherwise could. As for fund accounting, the district court found that the system was not practiced by the City.

In *Evans II*, to avoid the implications of the lack of substance in the City's justifications, the court of appeals relaxed the standard of review and merely found the justifications legitimate, but did not attempt to discern if they were

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13. Petitioners, at this juncture, divide addressing this issue. Section (a) reflects the arguments of petitioners Balark and Collum, while section (b) reflects those of petitioners Evans.

rationally related to the various classifications in the City's payment "system." The cases of this Court, which the court of appeals relied upon, all consistently recite and apply a two-tier test, which does not grant undue deference to the challenged municipal body. *City of Cleburne, supra*, 473 U.S. at 440 (and cases cited therein); *United States Railroad Retirement Board v. Fritz*, 449 U.S. 166, 174-75 (1980); *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 40 (1973); and *Dandridge v. Williams*, 397 U.S. 471, 486 (1970).

The test adopted and applied by the court of appeals will create significant difficulty in addressing municipal policies which treat similarly situated persons differently. The district courts will have difficulty determining whether or not the court of appeals' test or the standards set forth by this Court should be applied. The Court should grant this petition to clarify the appropriate test applicable to challenges to municipal policies on equal protection grounds.

b.[14] The City of Chicago followed a deliberate, official policy regarding payment of over-$1,000 tort judgments. Plaintiffs agree that no "fundamental right or suspect classification" is involved and that the appropriate standard of review is whether the classification is related to a legitimate interest of the City, as outlined in *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985).

The holding in *Evans II*, is that a local governmental entity can justify a discriminatory classification as founded on a "legitimate interest" even where the policy or practice violates existing state statutes and a municipal ordinance.

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14. This section is argument on behalf of petitioners Evans.

The interests of the City are:

1. Administrative efficiency: to pay off small judgments under $1,000 on a priority basis;

2. Sound fiscal management and accounting: to segregate monies generated from city enterprises like water and sewer and to pay judgments related to those activities directly from those funds;

3. Maintaining a "workable budgetary scheme."

The *Evans II* court held that these interests predominated and are controlling even if the effect is to counter the mandate of a state statute which clearly provides that a tort judgment must be paid, at the latest, within the "ensuing fiscal year" after the fiscal year of its entry as a final judgment.

Plaintiffs here argue the reverse: state statutes and local ordinances provide an objective framework for what a "rational scheme" is and what governmental interests are in fact "legitimate." When, as here, a discriminatory classification embracing tort judgments over $1,000 is created by the City of Chicago and those tort judgments are regularly, pervasively and deliberately paid far beyond the time framework for payment expressly marked out by state statute, then such a policy cannot be said to be in furtherance of a legitimate purpose.

In order to reverse the decision in *Evans I*, the court in *Evans II* cites only two decisions: *United States Railroad Retirement Board v. Fritz*, 449 U.S. 166, 179 (1980); and *Dandridge v. Williams*, 397 U.S. 471, 485-86 (1970). The decisions stand for the propositions that if the reasons for a statute are "within the legitimate goals of a government," a classification can be less than laudatory and less than perfect and still survive muster. There is no aspect of these decisions which affords any useful legal principle or guide to decide the factual situation in *Evans II*.

The *Evans I* reviewing court held that "if the City has not invoked Section 9-104(b) before the end of the fiscal year following the year in which the tort judgment becomes final, the tort holder may legitimately claim entitlement to immediate payment." The court held the right to immediate payment is a property right under Illinois law, and delay beyond that time is a "deprivation." 689 F.2d at 1297 (App.65). *Evans II* did not challenge or change this ruling.

What *Evans II* did was to balance off the claimed interests of the City of Chicago in following an officially adopted, formal municipal policy, against the requirements of the state statute, and hold that the policy interests of the City were entitled to greater weight than the policy interests expressed in the state statute. Illinois law holds, however, that to the extent that a municipal ordinance conflicts with a state statute, the ordinance is void. *Arrington v. City of Chicago*, 45 Ill.2d 316, 259 N.E.2d 22 (1970).

The *Evans II* court has confused the "good faith" defense in civil rights act cases with the equal protection requirement of "legitimate governmental interest." *Monell v. Department of Social Services*, 436 U.S. 658 (1978), held that a local government entity was a "person" under 42 U.S.C. §1983 and was subject to liability for official policy which offended federal constitutional guarantees. *Owen v. City of Independence*, 445 U.S. 622 (1980), allows a good faith defense to government officials, but not to the entity whose policy has transgressed constitutional rights. The states lack authority to confer immunity on a municipality, "good faith" or otherwise, from 42 U.S.C. §1983 liability. *Martinez v. California*, 444 U.S. 277 (1980). Therefore, any good faith inherent in the policies followed by the City of Chicago in paying tort judgments, premised on good accounting or sound fiscal management or budgeting cannot confer an immunity or defense on the City.

Harlow v. Fitzgerald, 457 U.S. 800 (1982), held that good faith immunity is determined according to an objective test. It is submitted that *no decision of this Court* has yet decided whether a 42 U.S.C. §1983 deprivation of a state law property right on equal protection grounds is subject to an objective test with respect to the "legitimate purpose" requirement. In the case at bar, an Illinois statute clearly expresses a state policy that all tort judgments not paid on a 10 year installment basis must be paid, at maximum, within two years of date of their finality. The proofs showed that the official policy and practice of Chicago is to deliberately pay over-$1,000 tort judgments substantially later than 2 years. Does the equal protection clause permit a weighing, or does the state statute contain an objective framework of state policy that a subservient municipal entity is not free to contradict with its own choice or scheme for payment?

Although the Supreme Court has not expressly spoken on this point, there are some analogous decisions. *Teleprompter of Erie, Inc. v. City of Erie*, 537 F.Supp. 6 (W.D.Pa. 1981) and *Three Rivers Cablevision, Inc. v. City of Pittsburgh*, 502 F.Supp. 1118 (W.D.Pa. 1980), both brought under 42 U.S.C. 1983, held that where state law confers a property right upon an unsuccessful bidder to a public contract, a claim for equal protection violation was stated where bidding procedures specified by local law were not adhered to. In *Three Rivers*, the court recognized that the bidding ordinance provided an objective, "facially neutral" standard by which the equal protection denial was measurable.

The plaintiff Evans class submits that Chapter 85, Section 9-104(a) and (b) provide a neutral, objective standard for judging the "legitimate governmental interest" of a municipality for equal protection purposes with respect to tort judgment payments, whether pursuant to ordinance or an official policy of the City. The trouble is, no decision of the Supreme Court before or after *Monell*, *supra*, has given a specific

guidance on this important point. If there was such guidance, the Seventh Circuit in *Evans II* could not possibly have held that the monetary, budgetary and accounting practices of the City supercede the requirements of a state statute directly on point.

3. This Court has held the law of the case doctrine narrow, though not impenetrable. *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800 (1988). Accordingly, a court should not revisit the previously decided matter unless it is "clearly erroneous *and* would work a manifest injustice." *Id.* at 831, *quoting Arizona v. California*, 460 U.S. 605, 618 n.8 (1983) (emphasis supplied). Of course, this doctrine never insulates an issue from review by the Supreme Court.

> While power rests in a federal court that passes an order or decision to change its position on a subsequent review in the same cause, orderly judicial action, except in unusual circumstances, requires it to refuse to permit the relitigation of matters or issues previously determined on a former review.

Insurance Group Committee v. Denver & Rio Grande Western Railroad Company, 329 U.S. 607, 612 (1947) (Frankfurter, J.) and cases cited therein. See also *Messinger v. Anderson*, 225 U.S. 436, 444 (1912).

This standard for the law of the case doctrine is stringently applied in the other circuits. In the District of Columbia Circuit the standard is "even if we were convinced of the error of a decision made on an earlier appeal in this litigation, we would adhere to the established 'law of the case' absent extraordinary cause to depart from our precedent." *Laffey v. Northwest Airlines, Inc.*, 740 F.2d 1071, 1076 (D.C.Cir. 1984) (per curiam of Bork, Starr and R. Ginsburg), *cert. denied* 469 U.S. 1181 (1985). The Fifth Circuit standard is that in the absence of both elements "the law of the case,

whether right or wrong, applies." *Todd Shipyards Corporation v. Auto Transportation, S.A.*, 763 F.2d 745 (5th Cir. 1985).

While the *Evans II* court stated the proper standard, 873 F.2d at 1014 (App.14), the court departed from the test in three respects. First, the court reopened *Evans I* based upon "new" evidence raised. In this case, no "new" evidence of justifications was, in fact, presented. The "new" justifications, pleasing more tort judgment holders and fund accounting, were superficial restatements of the rationales presented and rejected in *Evans I* (reducing litigation and interest costs). The court of appeals had no grounds to reverse circuit precedent.

Second, the court faulted petitioners for the review of *Evans I* because new equal protection liability grounds were raised (at the district court's request). 873 F.2d at 1012 & 1014 (App.10-11 & 14). And, in the final analysis, the court only found its prior holding clearly erroneous and not that it would "work a manifest injustice." 873 F.2d at 1016 (App.18). Clearly the court was not applying the standard of this Court or the one applied in the other circuits.

Other courts of appeals clearly do not allow ventures into precedent on such minimal showings. In *Laffey*, defendants sought to reopen liability on the claims of gender discrimination previously won by petitioners, but the court refused and stated that the "court will not, absent truly 'exceptional circumstances' look favorably on arguments against the law of the case which fall only under the 'manifest injustice' rubric." 740 F.2d at 1082 (citations omitted).[15] *Accord*

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15. Further restatement in the District of Columbia Circuit limits the doctrine to "correct clerical mistakes, to clarify [the] opinion or mandate, to remedy fraud on the court or other misconduct, to avoid divergent results in cases pending simultaneously, or to minister to other similar aberrations." *Laffey*, 740 F.2d at 1082 n.19 *quoting*

Bloom v. International Brotherhood of Teamsters Local 468, 752 F.2d 1312 (1984) (court refused to entertain new facts when on remand for damages because new evidence was not "substantially different" from what was previously presented). *See also Southwest Marine, Inc. v. Campbell Industries*, 796 F.2d 291 (9th Cir. 1986), *amended* 806 F.2d 898, *cert. denied sub nom. Triple "A" Machine Shop, Inc. v. Southwest Marine, Inc.*, 108 S.Ct. 227 (1987) (remand on fees does not allow relitigation of prevailing party); *Heath v. Brown*, 858 F.2d 1092 (5th Cir. 1988) (same); *Doe v. Marshall*, 694 F.2d 1038 (5th Cir.), *cert. denied* 462 U.S. 1119 (1983) (same).

The court of appeals deviated substantially from this Court's standards and the decision raises conflicts with other circuits over the application of the law of the case doctrine, both are issues which this Court should clarify.

4. The Court of Appeals should have remanded the issue of petitioners' due process claim, as the district court properly refrained from deciding what was, at that time, an unnecessary ruling on a constitutional question.

In *Evans II* the Court of Appeals three times referred to petitioners' due process claim, the latter two times stating that the district court had found against that claim.[16] In this

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Laffey II, 642 F.2d 578, 585-86 (D.C.Cir. 1980).

16. Footnote 11 stated:

> The *Evans II* district court found no due process violations and the due process issue was not argued by the parties on this appeal.

Footnote 15 stated:

> The due process claim has not survived to this stage of the litigation.

873 F.2d at 1012 & 1018 (App. 9 & 21).

case, however, the district court specifically refrained from addressing the due process issue, because it found an alternative constitutional ground, to wit an equal protection violation.[17]

It is well established that the district court ruled appropriately where two constitutional issues supporting relief are raised by petitioners. "If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable." *Jean v. Nelson*, 472 U.S. 846, 854 (1985), *quoting Spector Motor Company v. McGlaughlin*, 323 U.S. 101, 105 (1944). This matter of jurisprudential restraint is applicable to cases in which alternative state law grounds exist, see *id.*, as well as where an alternative constitutional ground exists. *Alexander v. Louisiana*, 405 U.S. 625, 633 (1972) (once an equal protection violation was found this Court refrained from reaching the due process question).

The Court of Appeals erred in failing to recognize the district court's restraint in ruling on the due process issue and failing to remand the case for full consideration of that claim. This Court should grant a writ of certiorari such that this case can be remanded for ruling on the due process question.

5. The *Collum* class was not a party to *Evans I*, thus collateral estoppel and not the law of the case doctrine applies to

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17. The *Evans II* district court ordered the briefing on the constitutionality of Section 9-104(a). Docket Entry 84. Plaintiffs filed a memorandum challenging the constitutionality (Docket Entry 86), defendants filed a response brief (Docket Entry 88), plaintiffs filed a reply brief (between Docket Entries 89 and 90, dated 5/4/87) and defendants were granted leave to file a surreply (Docket Entry 90).

the application of *Evans I* in *Evans II*. This subtle, but meaningful, distinction was ignored completely by the court in *Evans II*.

VII. CONCLUSION

The petition for a writ of certiorari should be granted.

January, 1989

Respectfully submitted,

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APPENDIX

In the

United States Court of Appeals

For the Seventh Circuit

Nos. 87-3006 and 87-3085

SYLVIA EVANS, *et al.*,

Plaintiffs-Appellees,

v.

CITY OF CHICAGO, *et al.*,

Defendants-Appellants.

BERTHA BALARK, *et al.*,

Plaintiffs-Appellees,

v.

CITY OF CHICAGO, *et al.*,

Defendants-Appellants.

CURTIS COLLUM, *et al.*,

Plaintiffs-Appellees,
Cross-Appellants,

v.

CITY OF CHICAGO, *et al.*,

Defendants-Appellants,
Cross-Appellees.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
Nos. 77 C 4419, 79 C 1939, and 79 C 2493—**John F. Grady**, *Judge*.

ARGUED SEPTEMBER 8, 1988—DECIDED APRIL 27, 1989

Before BAUER, *Chief Judge*, and WOOD, JR. and RIPPLE, *Circuit Judges*.*

WOOD, JR., *Circuit Judge*. This is a consolidated class action suit that has been in the courts for nearly a decade. The three plaintiff classes sued the City of Chicago under 42 U.S.C. § 1983 claiming that the City's delay in paying tort judgment claimants violated their civil rights. This court originally dealt with this case over six years ago. *Evans v. City of Chicago*, 689 F.2d 1286 (7th Cir. 1982) ("*Evans I*"). There we affirmed the district court's finding that Chicago's practice was unconstitutional. The case was remanded to the district court to sort out the question of damages due to the parties. In district court, plaintiffs advanced another equal protection claim in addition to the claim originally passed on by this court. The district court found for the plaintiffs on both equal protection allegations and awarded damages. The City has appealed, asking us not only to review the district court's findings but to also re-examine our own decision in *Evans I*.

I. FACTUAL BACKGROUND

Millions of dollars in court judgments are entered against the City of Chicago ("the City") each year. The City's practice of delaying payment of some judgments is under attack by three different plaintiff classes.

A. The Plaintiff Classes

Plaintiff Sylvia Evans settled her lawsuit against the City for the wrongful death of Andrew Evans and a judgment of $67,000 was entered against the City on January 30, 1976. After entry of her judgment, Evans learned that the City had a policy of promptly paying (within thirty

* This opinion has been circulated among all judges of this court in regular active service. No judge favored a rehearing *en banc* on the question of overruling *Evans v. City of Chicago*, 689 F.2d 1286 (7th Cir. 1982). Circuit Rule 40(f).

days) tort judgments under $1,000 while it delayed paying any tort judgments over $1,000 for a substantial time period. When Evans learned that the City would delay the payment of her judgment, she filed an action against the City under 42 U.S.C. § 1983 claiming that her civil rights had been violated by the delay. The action was certified as a class action under Fed. R. Civ. P. 23(b)(3). The *Evans* class includes tort judgment creditors holding judgments larger than $1,000 against the City whose judgment payments are more than one year overdue.[1]

Plaintiff Bertha Balark brought a civil rights action under 42 U.S.C. § 1983 against six Chicago police officers in 1977. The case was settled by the parties and a judgment was entered by the United States District Court. The judgment was to be paid by the City.[2] Upon learning that the City would delay paying her judgment, Balark brought a separate class action under 42 U.S.C. § 1983. The *Balark* class was certified and includes tort judgment creditors holding judgments larger than $1,000 against the City whose judgment payments are less than one year

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[1] The *Evans* class was defined as:

> [a]ll persons in whose favor a final tort judgment in excess of $1,000 against the City of Chicago has been or will have been entered commencing with the fiscal year 1972 and continuing to the date of the entry of final judgment in this case and payment of whose judgment is overdue by reason of the failure of the City of Chicago (a) to pay the judgment in full in the fiscal year it was entered or in full during the ensuing fiscal year in accordance with Ill. Rev. Stat. ch. 85, § 9-104(a) or (b) to commence timely payment of installments on the judgment pursuant to Ill. Rev. Stat. ch. 85, § 9-104(b) no later than the end of the first fiscal year following the entry of judgment. The class shall not include assignees or purchasers of judgments nor those persons who assigned, factored or "discounted" their judgments prior to full or partial payment by the City of Chicago. *Evans I*, 689 F.2d at 1290-91 n.6.

[2] Ill. Rev. Stat. ch. 85, § 9-102.

overdue.[3] The *Evans* and *Balark* actions were consolidated on January 28, 1981.[4]

Plaintiff Curtis Collum entered into a settlement with the City and four police officers who allegedly beat him. Collum claims that at the time his judgment was entered, it was the practice and custom of the City to delay payment of judgments from two to four years. As a result of these delays, a market developed for the sale of judgments against the City. Unwilling to wait to collect his judgment from the City, Collum sold his judgment at a discount. Collum filed this class action suit in 1979 under

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[3] The class was certified and defined as:

> [a]ll persons in whose favor a final tort judgment in excess of $1,000.00 against the City of Chicago has been or will have been entered commencing with fiscal year 1974 who have held their judgments without full satisfaction thereof for a period not greater than the end of the fiscal year following the year in which the judgment was obtained. *Evans I*, 689 F.2d at 1291 n.7.

[4] During the time these federal lawsuits were proceeding, similar actions had been filed in Illinois state court. In *Nebel v. City of Chicago*, 53 Ill. App. 3d 890, 369 N.E.2d 74 (1977), the City's practice of delaying payment of tort judgments was challenged. The parties settled the case in 1980, with the City agreeing to provide $9 million in each of the 1980, 1981, and 1982 annual budgets to pay tort judgment creditors. The City also agreed to appropriate adequate funds in the future to pay all tort judgments and attorneys' fees. This settlement was vacated and remanded by the Illinois Appellate Court. *Waters v. City of Chicago*, 95 Ill. App. 3d 919, 420 N.E.2d 599 (1981). The appellate court found that the settlement's provisions concerning trustee and attorneys' fees did not provide notice to the holders of judgments less than $1,000. *Id.* at 925, 420 N.E.2d at 604. The settlement was later revised by the trial court, but it was again vacated by the appellate court, *Waters v. City of Chicago*, 111 Ill. App. 3d 51, 443 N.E.2d 759 (1982), which was still troubled by the manner of awarding attorneys' fees. An issue of abstention was raised in the *Evans I* trial, but this court held that it was inappropriate for the federal court to abstain in this situation. *Evans v. City of Chicago*, 689 F.2d 1286, 1294-96 (7th Cir. 1982).

42 U.S.C. § 1983 alleging that the delay violated equal protection and due process. While the *Evans* and *Balark* classes are made up of creditors who waited for the City to pay their judgments, the *Collum* class is made up of plaintiffs who assigned their judgments at a discount. The class was certified under Fed. R. Civ. P. 23(b)(3). The *Collum* class includes tort judgment creditors holding judgments larger than $1,000 against the City who assigned their judgments at a discount knowing the City would delay payment.[5] Plaintiffs in the *Evans* and *Balark* classes are original judgment holders while the *Collum* plaintiffs are assignors, since they assigned their judgments at a discount. Eighty percent of judgment holders with judgments over $1,000 sold their judgments. Purchasers bought judgments at a discount and the amount of the discount reflect a prediction of the delay in payment. All three classes were consolidated at trial and on appeal.[6]

B. The City's Practice

Under the budgetary scheme adopted by the City, judgments levied against the City are paid out of different city funds depending on the origin of the claim. At trial, the City maintained that all tort and nontort judgments arising from certain special enterprise activities ("enterprise judgments") are paid from revenues generated by the enterprises themselves. Such enterprises include the Water Fund, the Sewer Fund, O'Hare Airport, Midway

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[5] The *Collum* class was defined as:

> [a]ll persons in whose favor a final tort judgment or settlement in excess of $1,000.00 against the City of Chicago has been entered and who, commencing with fiscal year 1974 assigned their tort judgments, at a discount, prior to full or partial payment, in reliance upon defendant's policy and practice of delaying payments of judgments. *Evans v. City of Chicago*, 522 F. Supp. 789, 807-08 (N.D. Ill. 1980).

[6] The *Collum* class was not a party to the appeal in *Evans I*.

Airport, and the Chicago Skyway. These enterprises are meant to be self-sustaining with user fees generating revenue and are separated for accounting purposes from the City's general revenue funds. Judgments arising from relationships undertaken by the City ("contract judgments") are paid from departmental funds. When a city department enters a contract, the department's budget is encumbered for the maximum amount that could be due under the contract. If a judgment is levied against the City for breach of that contract, the judgment is paid out of the encumbrance already on the books. The departmental appropriations that pay such contract judgments are financed by general municipal taxes appropriated to the City's general corporate fund. Judgments arising out of employment-related litigation are usually payable from the personnel budgets of the affected departments.

All remaining judgments against the City ("tort judgments") are paid from the City's Tort Judgment Fund, also known as the "395 Fund." Revenue for the 395 Fund is raised through a separate property tax levy. This fund is not part of the City's general corporate fund.

Between 1972 and 1983, the period we are most concerned with, the City normally paid enterprise judgments and contract judgments within thirty to one hundred-fifty days of presentment. However, this was not the case for judgments paid out of the 395 Fund. The 395 Fund was annually underfunded, resulting in the City's inability to pay off all tort judgments in a timely fashion. Tort judgments of $1,000 or less were given priority and paid off within approximately thirty days of presentment. Judgments over $1,000 were paid off in the order they were entered, but at a much delayed rate. The average delay in payment of tort judgments over $1,000 ranged from fifteen months to four years after the entry of final judgment. Payment of some judgments apparently was delayed as long as nine years. The City pays interest at the statutory 6% rate at the time it pays the judgment.

Ill. Rev. Stat. ch. 110, § 2-1303.[7] The delay in paying tort judgments stemmed from the City's practice of levying a special property tax each year to pay judgments at an amount that was far less than needed to pay the annual tally of judgments. The City refused to apply any other revenue to the payment of tort judgments.

C. *Evans I*

Plaintiffs individually and collectively launched a number of attacks on the City's system of paying tort judgments. In the first trial, the City's distinction between judgment creditors above or below $1,000 was alleged to be a violation of the equal protection clause of the fourteenth amendment. Plaintiffs also alleged that the practice of delaying

[7] Although the parties did not raise the issue, we have some concerns about the City's handling of tort judgments entered by a federal district court. The City's policy of paying the 6% interest rate mandated by Illinois law is correct for all judgments entered prior to October 1, 1982. On that date, 28 U.S.C. § 1961 was amended. The old language establishing interest on judgments entered in a federal court at the rate set by state law was replaced by language providing that judgment debtors pay interest at the "coupon issue yield equivalent" of U.S. Treasury bills. 28 U.S.C. § 1961(a). This new rate of interest does not apply to judgments entered before the effective date of the statute. *Merit Ins. Co. v. Leatherby Ins. Co.*, 728 F.2d 943, 944 (7th Cir.) (amended section 1961 does not apply to judgments entered before October 1, 1982), *cert. denied*, 469 U.S. 918 (1984). *See Litton Systems v. AT&T*, 746 F.2d 168, 175 (2d Cir.) (new rate not retroactive and it does not apply to cases pending at that date on direct review), *cert. denied*, 464 U.S. 1073 (1984); *United States v. Dollar Rent A Car Systems, Inc.*, 712 F.2d 938, 940 n.5 (4th Cir. 1983).

On judgments entered in federal district court after October 1, 1982, the City must pay the interest rate prescribed by 28 U.S.C. § 1961(a) and provide all relief ordered by the court. It is unclear from the record whether the City has followed this rule. The correct rate of interest is an essential part of the relief granted by a district court. When a judgment is entered by a federal district court, the City must pay the proper amount of interest, regardless of the limit set by state statute. *See Travelers Ins. Co. v. Transport Ins. Co.*, 846 F.2d 1048, 1053-54 (7th Cir. 1988).

payment of judgments for up to four years deprived them of due process.[8]

The district court, having certified the plaintiff classes, consolidated the *Evans* and *Balark* cases. On plaintiff's motion for partial summary judgment and immediate payment, the district court ordered the City to pay immediately all judgments held by *Evans* class members plus costs and interest, enjoined the City's practice of paying judgments of $1,000 or less before earlier-entered, larger judgments, and declared the practice unconstitutional. The court also declared that Ill. Rev. Stat. ch. 24, § 8-1-16 was

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[8] Plaintiffs also challenged the constitutionality of Ill. Rev. Stat. ch. 85, § 9-104, which states:

> (a) If a local public entity does not pay a tort judgment or settlement during the fiscal year in which it becomes final and if, in the opinion of its governing body, the unpaid amount of the tort judgment is not too great to be paid out of revenues for the ensuing fiscal year, the governing body shall pay the balance of the judgment during the ensuing fiscal year.
>
> (b) If the local public entity does not pay the tort judgment or settlement during the fiscal year when it becomes final and its governing body is of the opinion that the unpaid amount of the judgment or settlement is so great that undue hardship will arise if the entire amount is paid out of the revenues for the ensuing fiscal year, the governing body shall pay the judgment or settlement, with interest thereon, in not more than 10 annual installments. Each payment shall be of an equal portion of the principal of the tort judgment or settlement. The governing body, in its discretion, may prepay any one or more installments or any part of an installment.

Ill. Rev. Stat. ch. 85, § 9-104, *amended by* P.A. 84-1431, Art. 1, § 2, 1986.

The district court did not hold § 9-104(a) facially unconstitutional and the *Evans I* court therefore did not rule on that issue. *Evans I*, 689 F.2d at 1291-92. The district court did find § 9-104(b) unconstitutional and set forth the minimum procedures it found necessary to guarantee due process. This court in *Evans I* vacated that portion of the decision, finding that the district court improperly reached the issue. *Evans I*, 689 F.2d at 1299. The constitutionality of § 9-104 is not at issue on this appeal. This court will follow the lead of the *Evans I* court and refrain from expressing any opinion on the constitutionality of the statute.

unconstitutional, to the extent that it authorized the practice.[9] The district court found that the City's policy violated equal protection and deprived the plaintiffs of property without due process.[10]

On appeal, this court affirmed the district court's finding that the City's practice of paying judgments out of order was unconstitutional. The court in *Evans I*, applying the rational basis test articulated in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), found that the practice was a violation of equal protection.[11] The hold-

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[9] This statute allowed the City to levy a limited judgment tax in addition to the maximum amounts authorized for all other taxes and it exempted judgments of $1,000 or less from the requirement that judgments be paid in the order in which they were obtained. *Evans I*, 689 F.2d at 1299 n.16. On appeal, the *Evans I* court found that although the City's practice did not originate with Ill. Rev. Stat. ch 24, § 8-1-16, it was still unconstitutional insofar as it incorporated the practice. *Evans I*, 689 F.2d at 1300.

[10] The district court also declared the judgment final and appealable under Fed. R. Civ. P. 54(b) and reserved the issue of attorneys' fees. *Evans I*, 689 F.2d at 1291.

[11] The *Evans I* court also discussed whether the City's practice deprived the plaintiffs of property without due process. *Evans I*, 689 F.2d at 1296-99. The court concluded that Illinois law created a right to prompt payment of a judgment in some circumstances. The *Evans I* court found that:

> [u]nder Illinois law, if the City has not invoked § 9-104(b) before the end of the fiscal year following the year in which the tort judgment became final, the tort judgment holder may legitimately claim entitlement to immediate payment. Thus, at least in that situation, the right to immediate payment of a tort judgment against a municipal corporation becomes a property right under Illinois law.

Evans I, 689 F.2d at 1297.

Delaying payment after that time constituted a deprivation of property for purposes of the fourteenth amendment. *Id.*

The importance of this due process finding is unclear. While the *Evans I* court found a deprivation, *see also Minton v. St. Bernard Parish School Bd.*, 803 F.2d 129, 132 (5th Cir. 1986) (distinguishing *Evans I* since Illinois law creates specific property right);

(Footnote continued on following page)

ing in *Evans I* applied only to the issue of paying tort judgments assessed to the 395 Fund out of order. The district court's decision was affirmed[12] and the case was sent back to iron out the question of damages and other issues.

D. The Consent Decree

After this case was remanded to the district court, the City negotiated a consent decree with the *Evans* and *Balark* plaintiffs. The consent decree, entered on May 31, 1984, governs the payment of tort judgments that remained unpaid as of December 31, 1983 and the payment of future judgments beginning in 1984. The decree was designed to bring payment of judgments up to a current basis by the end of 1985. The decree required that the City appropriate sufficient funds annually to satisfy the City's anticipated tort liabilities. The decree also required the City to pay its judgments in the order in which they are entered. The decree expressly left open all claims to damages; by its terms it could not be used as evidence in the trial. No judgments entered after December 31, 1984 were at issue in the *Evans II* trial.

E. *Evans II*

This case returned to the district court in 1987, ostensibly for computation of damages. However, the plaintiffs

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[11] *continued*

Argento v. Village of Melrose Park, 838 F.2d 1483, 1491 (7th Cir. 1988) (*Evans I* stands for proposition that Chicago's practice was "deprivation of property without due process of law"), the focus of *Evans I* and all subsequent litigation has been the alleged equal protection violations. The *Evans II* district court found no due process violations and the due process issue was not argued by the parties on this appeal.

[12] The *Evans I* court vacated the section of the district court's opinion that found Ill. Rev. Stat. ch. 85, § 9-104(b) unconstitutional. *Evans I*, 689 F.2d at 1300.

were not content with the liability established by this court in *Evans I* and presented a new theory of liability to the district court. The plaintiffs noted that enterprise and contract judgments were paid in order while tort judgments were delayed. Plaintiffs now argued that delaying the payment of tort judgments out of the 395 Fund while promptly paying nontort judgments with other funds violated equal protection.

The district court agreed and found that this system constituted a separate equal protection violation. The district court held that the City violated equal protection by not paying all judgments in order, regardless of the source of funding or the amount of the judgment. The court found that the holders of tort judgments for amounts greater than $1,000 were denied equal protection because they suffered greater delays in the payment of their judgments than did judgment creditors who held enterprise judgments, contract judgments, judgments payable from department personnel budgets, or judgment creditors who held tort judgments of less than $1,000 and received priority payment from the 395 Fund. The City's chronic underbudgeting of the 395 Fund was in itself an equal protection violation and the district court stated that the City must raise taxes to pay off judgment creditors. The district court could find no rational basis for paying judgments out of separate funds or for underfunding the 395 Fund. The district court dealt with whether paying tort judgments under $1,000 before judgments over $1,000 violated equal protection by stating that this court's holding in *Evans I* was the law of the case.

The district court created a complicated system for computing damages resulting from the equal protection violations. *Evans* and *Balark* plaintiffs would receive interest on their judgments at a rate greater than the statutory post-judgment rate of 6%. The interest would be computed beginning on the sixty-first day after entry of the judgment through the date the judgment was actually paid. The interest rate is to be calculated pursuant to a for-

mula stipulated by the parties that will yield a rate of interest equal to "the difference between the statutory rate of interest and the money that plaintiffs could have earned with the funds had they had them when they should have had them." *Collum* plaintiffs were divided into two groups based upon the length of the City's delay in paying tort judgments at the time a given judgment was sold at a discount. *Collum* plaintiffs who sold their judgments during a time when the City was delaying payment by a year or more were awarded damages equal to the amount of their discount, prorated over the period beginning sixty-one days after the entry of judgment through the date of payment to the assignee, plus interest at the stipulated rate. *Collum* plaintiffs who assigned their judgments at a time when the City was delaying payments by less than a year were awarded damages on the same basis as the *Evans* and *Balark* plaintiffs.

Final judgment was entered on November 23, 1987 and the City filed a timely notice of appeal. The City asks this court to re-examine its decision in *Evans I* and argues that this case falls within a recognized exception to the law of the case doctrine. The City also asks us to reverse the *Evans II* district court's new findings on equal protection. The *Collum* plaintiffs also filed a cross appeal, claiming that the district court incorrectly calculated the damages due their class members.

II. DISCUSSION

This case presents us with the unfortunate and difficult task of re-examining an earlier decision of this court. We must first examine the law of the case doctrine and determine its applicability to the present situation. This court's decision in *Evans I* must be analyzed to determine how that opinion should affect this appeal. This court must also review the district court findings of additional equal protection violations.

A. The Law of the Case

The first issue is what effect we should give to this court's decision in *Evans I*. While that prior appeal did not dispose of all the issues presented on this appeal, the *Evans I* court did hold that the City's practice of delaying payment of tort judgments over $1,000 violated equal protection. This court has long held that "matters decided on appeal become the law of the case to be followed in all subsequent proceedings in the trial court and, on second appeal, in the appellate court, unless there is plain error of law in the original decision." *Kaku Nagano v. Brownell*, 212 F.2d 262, 263 (7th Cir. 1954). The law of the case doctrine "is a rule of practice, based on sound policy that, when an issue is once litigated and decided, that should be the end of the matter." *Barrett v. Baylor*, 457 F.2d 119, 123 (7th Cir. 1972) (citing *United States v. United States Smelting, Refining & Mining Co.*, 339 U.S. 186, 198 (1950)).

It is important to note that the law of the case doctrine does not limit this court's power to reconsider earlier rulings in a case. The doctrine

> is a self-imposed prudential limitation rather than a recognition of a limitation of the courts' power. 1B Moore's Federal Practice ¶ 0.404[10] at 573 (2d ed. 1980). It is not, therefore, an immutable rule, but rather a way to foreclose continued appeals for reconsideration of prior rulings of law. In this respect, the law of the case doctrine must be distinguished from *res judicata*: '[O]ne directs discretion; the other supersedes it and compels judgment.'

Gertz v. Welch, 680 F.2d 527, 532 (7th Cir. 1982), (quoting *Southern Ry. Co. v. Clift*, 260 U.S. 316, 319 (1922)), *cert. denied*, 459 U.S. 1226 (1983).

This court has, on a limited number of occasions in subsequent appeals, reconsidered a previous decision in the same case and concluded that the former ruling was clearly erroneous. *See, e.g. Devines v. Maier*, 728 F.2d 876,

880 (7th Cir.) (intervening Supreme Court decision led to reversal of earlier decision), *cert. denied*, 469 U.S. 836 (1984); *Appleton Elec. Co. v. Graves Truck Line, Inc.*, 635 F.2d 603, 608 (7th Cir. 1980) (earlier pronouncement on jurisdiction was in error), *cert. denied*, 451 U.S. 976 (1981); *United States v. Habig*, 474 F.2d 57 (7th Cir.) (earlier decision was erroneous), *cert. denied*, 411 U.S. 972 (1973). Such a reconsideration should be avoided unless "one of three 'exceptional circumstances' exists: the evidence in a subsequent trial was substantially different; controlling authority has since made a contrary decision of law applicable to such issues; or the decision was clearly erroneous, and would work a substantial injustice." *Barrington Press, Inc. v. Morey*, 816 F.2d 341, 342-43 n.2 (7th Cir. 1987) (quoting *Kori Corp. v. Wilco Marsh Buggies & Draglines, Inc.*, 761 F.2d 649, 657 (Fed. Cir. 1985)), *cert. denied*, 474 U.S. 902 (1987). *See also Devines*, 728 F.2d at 880. Applying these guidelines to this case, we note that there was indeed some new evidence at the second trial explaining why the City chose to prioritize judgments under $1,000. The record at the first trial was sparse on the subject of the City's reasoning for its practice. Plaintiffs chose to reopen the merits of this case in the second trial to establish a separate equal protection violation. This allowed the City to bring in more evidence explaining its conduct. While this new evidence alone may not compel reconsideration of our prior adjudication, this court is left with substantial doubt as to the correctness of that decision. By going beyond the remand for computation of damages and reopening and extending the equal protection analysis to a related situation, the underlying equal protection analysis was again exposed for reconsideration and review. "The law of the case does not demand obsequiousness right or wrong." *Champaign-Urbana News, Inc. v. J.L. Cummins*, 632 F.2d 680, 683 (7th Cir. 1980). We will therefore reconsider our prior determination in this matter to determine whether it may have been wrongly decided.

B. *Evans I* Equal Protection Analysis

The City's actions are being challenged under 42 U.S.C. § 1983[13] and its alleged equal protection violations fall into two categories. In the *Evans II* trial, the district court found that the City was obligated by the equal protection clause to establish a single order of payment for all judgments of any kind entered against the City. In addition, the City was obligated to raise sufficient revenues through taxation to allow it to pay all tort judgments from the 395 Fund as promptly as it paid other judgments. This holding by the district court is distinct from the prior decision made by this court in *Evans I*. There, we held that the City's practice of paying off all tort judgments under $1,000 within thirty days while delaying payment of judgments over $1,000 violated equal protection. *Evans I*, 689 F.2d at 1300. It is this *Evans I* holding that we must now review to determine whether it was clearly erroneous and should be reversed.

The equal protection clause "commands that states treat similarly situated people in a similar manner." *Faheem-El v. Klincar*, 841 F.2d 712, 727 (7th Cir. 1988) (en banc). *See City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439 (1985). The first question presented is what standard of review this court should use in examining the validity of the City's practice. *Griffin High School v. Illinois High School Ass'n*, 822 F.2d 671, 674 (7th Cir. 1987). The court initially must determine whether the practice infringes on a fundamental right or discriminates on the basis of a suspect classification. *Faheem-El*, 841 F.2d at 727. Here, the classification made by the City is between holders of judgments larger than $1,000 and holders of judgments smaller than $1,000. This categorization does not implicate any fundamental right and it is not a suspect classification. When no suspect class or fundamental right

[13] A city can be held liable under 42 U.S.C. § 1983 for unconstitutionally implementing a policy or custom. *Monell v. New York City Dept. of Soc. Servs.*, 436 U.S. 658 (1978).

is involved, the court must apply a very deferential rational basis test. Under this test, "legislation is presumed to be valid, and will be sustained as long as the classification drawn by the statute is rationally related to a legitimate state interest." *Griffin*, 822 F.2d at 674. *See also City of Cleburne*, 473 U.S. at 440; *Vaden v. Village of Maywood*, 809 F.2d 361, 365 (7th Cir.), *cert. denied*, ____ U.S. ____, 96 L.Ed. 2d 381, 107 S. Ct. 2489 (1987).

The court in *Evans I* applied the rational basis test and concluded that the City's practice was not rationally related to a legitimate state purpose. In *Evans I*, the City argued that its practice "related rationally to the City's attempt to reduce litigation and interest costs by encouraging quick settlements for $1,000 or less without interest in a large amount of nuisance litigation." *Evans I*, 689 F.2d at 1299. The *Evans I* court examined this rationale and found it wanting. The court noted that the City paid fully litigated claims under $1,000 and the court questioned whether the practice would reduce interest costs since interest would accumulate at the statutory rate on the unpaid judgments. *Id.* The *Evans I* court could "discern no rational basis for the City's challenged classification." *Id.* at 1300.

The City urges us to reverse this finding and find that its practice does not violate equal protection. In addition to the reasons presented to the court in *Evans I*, the City presented other explanations of its practice at the second trial. A former city comptroller testified that the prioritization was designed to accommodate a large number of small tort judgment creditors and reduce the total number of creditors waiting for payment. Since a large number of small judgments could be paid with the limited amount of money in the 395 Fund, the total number of judgment creditors awaiting payment at any one time could be reduced. Small judgment holders were thus spared the lengthy waits experienced by large judgment holders and the City argues that plaintiffs failed to prove that the priority payments to small judgment creditors actually increased the delays experienced by large judgment creditors.

The reasons presented by the City for the practice are by no means compelling. While the policy choice to pay judgments under $1,000 before paying judgments over $1,000 may not be a civics textbook example of good government, this court does not judge governmental actions by that standard. A governmental classification that does not affect a suspect class or fundamental right must be upheld "unless no reasonably conceivable set of facts could establish a rational relationship between the classification and an arguably legitimate end of government." Nowak, Rotunda, Young, *Constitutional Law* (2d ed. 1983). Governments must be given wide latitude in these types of regulations. *City of Cleburne*, 473 U.S. at 440; *Vaden*, 809 F.2d at 365. If a government decision is improvident, the political process and not the court has the responsibility for rectifying any error. *City of Cleburne*, 473 U.S. at 440.

Under this extremely deferential standard, it is clear that the classification system set up by the City should not be struck down by this court. The City offered a number of reasons for its classification system. Most importantly, at the second trial the City argued that paying off smaller judgments early satisfied more claimants; without such a bifurcation of payments, all tort judgment creditors would have experienced lengthy delays. The district court found that the purpose of satisfying more claimants was invalid. However, we find nothing to indicate that such a goal is impermissible. The purpose behind a government enactment need not be laudatory—to pass constitutional muster, the purpose must simply be legitimate. If the court can hypothesize plausible reasons for legislation that are within the legitimate goals of a government, nothing else is required to validate the governmental classification and it does not matter whether the reasons advanced actually motivated the legislative action. *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980). Vicious or irrational discrimination violates the equal protection clause. *Jackson v. City of Joliet*, 715 F. 2d 1200, 1203 (7th Cir. 1983), *cert. denied*, 465 U.S. 1049 (1984). No such discrimination is evident in this case. At

worst, the City is merely attempting to satisfy as many individual claimants as possible with the limited revenues available. The City's practice of paying small tort judgments in advance of larger ones does not violate the equal protection rights of the holders of large tort judgments. This court's finding in *Evans I* that the City's practice violated equal protection was clearly erroneous and must be reversed.

C. *Evans II* Equal Protection

At the second trial, plaintiffs presented and the district court approved a second theory of liability. The district court found that the City's practice of delaying tort judgment payments from the 395 Fund while paying other nontort judgments promptly was a separate equal protection violation. In essence, the district court held that to avoid violating the equal protection clause, the City must establish a single order of payment for all judgments of any kind entered against it. The district court also found that since the City was able to pay some types of judgments, such as enterprise or contract judgments, in a timely manner it must raise enough revenue to pay off all outstanding judgments just as promptly. The district court held that the City's "chronic underbudgeting" was itself a violation of equal protection. The court found that the City could not claim poverty as an excuse for delaying payments to some creditors while at the same time promptly satisfying the claims of others; the court discounted the City's budgetary policy of keeping separate accounts and found that there could be no rational distinction between the tort judgment owned by the plaintiffs and other judgments paid off in a preferential manner by the City.[14]

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[14] The plaintiffs also argue that, beyond its practice of classifying and prioritizing judgments under its budgetary scheme, the City also often paid judgments out of order for unknown or sus-

(Footnote continued on following page)

Under the City's budgetary scheme, judgments are to be paid out of different city funds depending on the origin of the claim. Enterprise judgments are paid from revenues generated by the enterprises themselves. Contract judgments are paid from departmental funds. Judgments arising out of employment-related litigation are usually payable from the personnel budgets of the affected departments. The 395 Fund is supposed to pay for all remaining tort judgments. The 395 Fund is a special revenue fund that can only be used for a defined purpose—part of the property tax is earmarked for that purpose. The City argued that this system of budgeting made it impossible to pay off all judgments on an equal basis. The district court was unconvinced. While acknowledging that the City's system of budgeting may have made good accounting sense, the court found that it could not explain the disparate treatment. The court noted that tort judgments could also have been charged to specific departments, as other judgments were. Alluding to the personnel judgments charged to departments, the court noted that the City had stated that such matching of costs to departments would act as a deterrent to future misconduct. The court reasoned that other kinds of conduct leading to tort judgments, such as police brutality cases, should be charged back to departments as well. The court found the City's differentiation between tort and nontort judgments to be irrational.

In reviewing this holding by the district court, we must again apply the rational basis test of equal protection to the City's practice. Under this standard, the City's budgetary scheme does bear some rational relationship to legitimate state ends. The City's practice of charging

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[14] *continued*
picious reasons. As an example of such conduct, the plaintiffs note that money was paid promptly for injuries sustained when former Mayor Daley's limousine hit another car. The district court found that there was insufficient evidence to prove that the City had a custom or practice sufficient to trigger 42 U.S.C. § 1983 and we will not disturb that finding.

judgments incurred by enterprise funds to those funds seems rationally related to the concept of such a fund—a self-sustaining or break-even operation supported by its users. Charging departmental budgets for contract damages conforms to the normal accounting practice of matching expenditures to the appropriate entity that incurred the liability. Similar rational reasons exist for charging personnel damages to the involved department. The 395 Fund is by law a special revenue fund and can only be used for its defined purpose.

The district court found fault with this system and while it may not be perfect, we do not believe that it sinks to the level of being irrational. Under the equal protection analysis, the City's practices can be rationally related to the legitimate interests involved in maintaining a workable budgetary scheme. It is not this court's province to prescribe the budgetary workings of the City of Chicago. Such things are beyond the expertise of the judiciary. *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 41 (1973). While it may have been more logical, as the district court pointed out, to charge all judgments back to the responsible departments, the City's lack of symmetry in its policy does not constitute an equal protection violation. *See Dandridge v. Williams*, 397 U.S. 471, 485-86 (1970) (failure of state to make perfect classifications not equal protection violation).

Likewise, the district court's holding that the equal protection clause demands that the City raise more tax revenue to meet all obligations promptly is not warranted under the rational basis test. A City must consider many things when assessing taxes. Determining an appropriate level of taxation is fundamentally a local decision. As Justice Powell noted, "we stand on familiar ground when we continue to acknowledge that the Justices of this Court lack both the expertise and the familiarity with local problems so necessary to the making of wise decisions with respect to the raising and disposition of public revenue." *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. at 41. This court must avoid attempting to determine for itself whether the City is able to raise more revenue. Such

a decision is better left to local taxpayers acting through their elected officials. The City's alleged failure to raise adequate revenue to quickly meet all its tort judgment obligations does not violate equal protection.

The district judge advanced some worthy ideas, but they are for the City's self-determination, and will not be imposed by this court. It is regrettable that this matter which has lingered so long now takes a new and possibly unexpected turn, but what we now view as error must be arrested even at so late a date. Improvements in this situation are better left to the state and municipal governments.

III. CONCLUSION

Our decision in *Evans I* was clearly erroneous in its conclusion that the City's practice of prioritizing tort judgments under $1,000 denied the plaintiffs the equal protection of the laws. To that extent we overrule *Evans I*.[15] We find that the City's failure to establish a single order of payment of all judgment creditors did not violate equal protection. Therefore, the decision of the district court is REVERSED. Costs are waived.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

[15] There is some question as to what effect we must give to the due process language in *Evans I*. *See supra* note 11. The district court in *Evans II*, while acknowledging the due process findings in *Evans I*, did not base its holding on any due process violation. The district court decided this case solely on equal protection grounds and damages were awarded on that basis alone. The parties to this appeal also did not raise any issue of due process. The due process claim has not survived to this stage of the litigation.

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 77 C 4419

SYLVIA EVANS, ADMINISTRATOR OF THE ESTATE OF ANDREW EVANS, DECEASED, *Plaintiffs,*

v.

CITY OF CHICAGO, et al., *Defendants.*

No. 79 C 1939

BERTHA BALARK, DANA BALARK, ANNE BALARK AND DANE BALARK, BY THEMSELVES AND FOR ALL OTHERS SIMILARLY SITUATED. *Plaintiffs,*

v.

CITY OF CHICAGO, et al., *Defendants.*

No. 79 C 2493

CURTIS COLLUM, BY HIMSELF AND FOR ALL OTHERS SIMILARLY SITUATED, *Plaintiffs,*

v.

CITY OF CHICAGO, et al., *Defendants.*

TRANSCRIPT OF PROCEEDINGS
October 22, 1987
BEFORE THE HONORABLE JOHN F. GRADY

[beginning at page 7, line 24]

I will give you my findings of fact and conclusions of law. First I will tell you what the findings of the Court are with regard to the customary and routine practices of the City of Chicago from 1972 until some time in the early lawsuit. I will concentrate on those practices as they pertain to

judgments over $1,000.

First, the City did not pay such judgments within the year the judgment was entered. Secondly, the City did not pay such judgments in the ensuing year. Thirdly, the City did not pay those judgments in 10 annual installments. Fourthly, the City did not pay such judgments in accordance with any state statute. Fifth, the City did not pay those judgments in accordance with its own ordinance, Ordinance 7-29, which required that they be paid in order of entry. And sixth, the City made no attempt to budget enough money to pay judgments over $1,000 in accordance with the time limits established by statute or its own ordinance.

In short, with respect to judgments over $1,000, it was the custom and practice of the City simply to ignore the requirements of law with regard to when those judgments should have been paid.

I will now discuss those practices of the City in light of the arguments that the parties have made in regard to the question of due process under the Fourteenth Amendment and Section 1983. Any sensible concept of due process implies substantial adherence to whatever law is applicable to the situation. Clearly, that is the process that is due.

The intentional and consistent failure of the City to comply with the time requirements of the applicable statutes and its own ordinance seem to me to have constituted a violation of due process owing to the members of the plaintiff classes.

We have had colloquy here the last few days on the distinction between procedural and substantive due process. It seems to me that the practices of the City may well be or have been, because we are speaking in the past tense here, a

violation of both procedural and substantive due process. The argument for a violation of procedural due process is that the City followed no process at all. There simply was no procedure other than a consistent and intentional disregard of the procedure that was clearly established by law. The reason, it seems to me, that the practice of the City may have been a substantive due process violation is that there was no rational justification for the City's disregard of the statutes which should have governed its behavior.

In Griffin High School v. Illinois High School Association, 822 Fed. 2d 671, decided by the Seventh Circuit in 1987, the Court said at page 676:

"... to survive substantive due process analysis, a regulation need only 'bear a rational relation to a legitimate government interest.'"

If the survival of a substantive due process analysis requires a legitimate relationship or a rational relationship to a legitimate governmental interest, it seems to me that that relationship is lacking here. I will discuss that in connection with my later remarks concerning equal protection. The analysis of rational relationships seems to me to be the same in both substantive due process and equal protection analysis.

It seems to me, therefore, that the practice of the City probably violated the due process rights of the plaintiffs. I emphasize that I am talking about the practice of the City because I need not reach even by way of discussion the question of whether the procedure specified in Section 9-104(a) comports with due process. The reason I need not reach that question is that the City never made any effort whatever to comply with that statute. It simply isn't involved in this case. The City relies upon the statute in another connection

but not in the sense that it paid the plaintiffs in the manner required by either 9-104(a) or, failing that, 9-104(b).

Whether a due process violation occurred is only the first question that one would be required to answer in a due process analysis. The second question would be whether the conduct of the City which violated due process constituted a deprivation of the plaintiffs' property.

The parties disagree as to whether plaintiffs judgments constituted property from the date of their entry. Plaintiffs say that the judgments were property, and defendants contend that whatever the status of the judgments at the time of their entry, there was no property right in payment of the judgments until the end of the ensuing fiscal year, by virtue of Section 9-104(a).

Support for each of these views can be found in the law of the case or the law cited in this case in the decision of the Seventh Circuit, Evans v. City of Chicago, 689 Fed. 2d 1286. At page 1296, the Court said:

"Under Illinois law, a judgment becomes a vested right of property once it is no longer subject to review or modification."

The Court cited several Illinois cases for that proposition.

Later in the opinion at page 1297 the Court stated:

"Upon review of the relevant statutes and decisions, we agree with the District Court that under Illinois law, if the City has not invoked 9-104(b) before the end of the fiscal year following the year in which the tort judgment became final, the tort judgment holder may legitimately claim entitlement to immediate payment. Thus, at least in that situation,

the right to immediate payment of a tort judgment against a municipal corporation becomes a property right under Illinois law."

Now, the defendant cites that language as a holding by the Court of Appeals that there was no property right in these judgments that plaintiffs could have been deprived of by defendants' conduct prior to the time specified in Section 9-104(a).

I do not regard that language as constituting such a holding, because the Court specifically said that the right to payment became property "at least in that situation." The Court would have had no occasion to add the words, "at least in that situation," if it had intended to foreclose the possibility that a constitutional right to payment or a property right in payment may have existed at some prior time. I do not regard the issue of the constitutionality of Section 9-104(a) as having been decided yet in this case either by me or by the Court of Appeals.

If I had to reach the question, I would hold that in the circumstances of this case, Section 9-104(a) did not define the property right of the plaintiffs, simply because the City never made payment within the time specified in that statute. I realize there are two sides to that question, but I have great difficulty with the City's argument that it can ignore a statute, deliberately fail to comply with its requirements, and then say that that very statute defines the other party's rights.

Now, clearly, there was a due process violation of the plaintiffs' rights to the extent that they were not paid at the end of the ensuing fiscal year. I do not understand the City to contend otherwise. So we do reach the due process question in that limited sense, and I think the Court of Appeals'

quotation that I just read clearly indicates the view of that Court that a due process violation occurred the moment the City failed to pay at the end of the ensuing fiscal year.

That, however, is not the primary due process question that is presented by this case; rather, the very difficult question that is presented, or would be presented, is whether failure to pay within the time limited by Section — let me start over — whether failure to pay within whatever time the Court determines is a reasonable time would constitute a due process violation even though payment were made within the time limited by Section 9-104(a).

As plaintiffs have suggested during the trial, it is possible to decide this case without deciding the facial constitutionality of Section 9-104(a). I agree with the plaintiffs that it is possible to decide the case on the basis of equal protection. The Court of Appeals has already held that there is an equal protection violation in one respect, and what remains for this Court to decide is whether there are also other grounds for finding an equal protection violation.

Because another ground, namely, the equal protection ground, does exist, it seems to me that I should not reach the question of whether Section 9-104(a) is facially constitutional, and that, I take it, is especially true in light of my inclination to hold the statute unconstitutional should I reach the question. As Justice Rehnquist said in his opinion in the case of Jean v. Nelson, 472 US 846 at 854, quoting from the earlier case of Spector Motor Company v. McLaughlin.

"If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality unless such adjudication is unavoidable."

Now, as is true with so many pronouncements of law, the applicability of that doctrine to the facts of this case is not altogether clear to me. We are already reaching one constitutional question, namely, that of equal protection, and we are going to decide it. The only basis for deciding the case is a constitutional one, because that is the basis of the Court's jurisdiction, and the question really is whether, if you can decide the case on one constitutional basis, should you stop short of reaching a second and alternate constitutional basis.

In short, what we have here is not a case where we can avoid constitutional questions altogether, but one where we have to decide at least one no matter what we do. In those circumstances, does the doctrine of avoiding constitutional questions apply? I believe it does, but the matter is not altogether free from doubt in my mind.

That doubt notwithstanding, however, I do not reach the question of whether the City's practice of paying judgments at times beyond 60 days after their entry and up to the end of the ensuing fiscal year violates due process, nor do I reach the question of whether Section 9-104(a) is facially violative of either due process or of equal protection (because plaintiffs also suggest that to the extent that Section 9-104(a) classifies tort judgments in a manner different than other kinds of judgments, it violates equal protection.) I do not reach those questions.

I turn now to the matter of equal protection. In one of the citations furnished yesterday by the City, Minton v. St. Bernard Parish School Board, 803 Fed. 2d 129, a Fifth Circuit case decided in 1986, the Court stated at page 132:

"The constitutional right to equal protection, however, is not predicated upon the existence of a property right. Due

process safeguards only against the deprivation of life, liberty or property, but every person is entitled to equal protection, even with regard to interests that do not constitute life, liberty or property in the constitutional sense."

So, in short, the equal protection analysis is entirely independent of the question of whether plaintiffs had any property right to have payment of their judgments prior to the end of the ensuing fiscal year.

The evidence revealed the following in regard to the City's practices in paying judgments. During the times in question in this suit, and all of these factual determinations have to do with that period of time, the City paid judgments of $1,000 and under within 30 days customarily, within 30 days of their entry. According to the stipulation that was entered into yesterday, the majority of non-tort judgments were paid within 30 to 150 days after demand for payment was made. The evidence showed that contract judgments were ordinarily paid from line item accounts in the general corporate fund that had to do with the particular department that had made the contract and sometimes even with the particular activity concerning which the contract had been entered into.

The evidence further showed that if there was not money available within the budget for that particular line item, it would be found elsewhere in the general corporate fund, and contract judgments would be paid from those moneys within the 30- to 150-day time period just mentioned. The evidence further showed that as to judgments entered against departments or agencies of the City that were considered to be enterprise departments or agencies, the judgments would be paid out of the funds appropriated or collected by that department or agency. The primary example was that water

judgments, judgments against the water department, were paid out of the funds of the water department.

The evidence further showed that in cases involving judgments obtained by employees of various City departments and agencies such as Shakman judgments or other kinds of employment discrimination judgments, the usual source of payment for those judgments was the budget of that particular department. Those judgments were not paid out of the tort judgement funds that were used to pay the other kinds of tort judgments.

Now, all of these practices resulted in these other kinds of judgment creditors receiving payment at a substantially earlier time than the judgment creditors who are members of the plaintiff classes. As I indicated, the difference could have been as long as that between 30 days for the under $1,000 judgment creditor and up to five years or more for the holder of the tort judgment in an amount exceeding $1,000.

The City sought at an earlier time to justify the preference given to holders of judgments under $1,000, and the justifications tendered were rejected both by me and by the Court of Appeals. As I have previously indicated, I think that is the law of this case. The defendant has offered an additional justification during the course of the trial, and I will comment upon that in a moment.

The question in regard to all of these practices is whether there is a rational justification for the different treatment of these judgment creditors vis a vis the judgment creditors who are members of the plaintiff classes. The question is not whether there is a rational basis for how the City handled these other kinds of payments. My impression of the City's presentation was that it believed, or at least was attempting to

cause me to believe, that the only question is whether a sensible reason can be given for, for instance, paying Shakman judgments out of the budget of the Department of Streets and Sanitation if the plaintiff employee happened to be discriminated against by that department. That is not the question before me.

The question is whether there is a rational basis for the distinction drawn by the defendant between the plaintiff class and these other judgment creditors. If the same kind of rationale could be applied to payment of the judgments of the plaintiff classes as was applied to the earlier payment or preference given to these other judgment creditors, then, clearly, no rational basis has been offered for the distinction the defendant made between these different classes of judgment creditors.

I would like to turn now, therefore, to a discussion of the reasons offered by the defendant for the preferential treatment given the other judgment creditors. Now, I should say in fairness the City did not attempt to justify preferential treatment. They attempted to justify different treatment. They do not regard it a preferential. But the effect of paying judgments out of these other funds for other creditors was to accelerate their payments substantially in regard or in relation to the times at which members of the plaintiff classes were paid.

I will not rehash the reasons given initially by the defendant to justify the different treatment of judgment holders of $1,000 or less. The additional justification given at the trial is that this was a good way to satisfy more people. There were more $1,000 and under judgments than there were anything else, and if you gave them preference, you satisfied

more people. Now, that is good politics, I suppose, although I doubt that $1,000 and under judgment creditors would determine the balance at the polls in any election. But it does not seem to me to be good constitutional law.

If the effect of a practice is to discriminate against a class of persons, it is no answer to say that by doing that you contribute to the happiness of the larger class of persons who are not being discriminated against. If the kind of analysis were a valid equal protection argument, then I suppose that all of the Jim Crow laws that existed in the South in days gone by could have been justified on the basis that they were really making more people happy than they were making unhappy, or at least more voters happy than they were making unhappy.

In short, I do not think that the happiness principle or satisfaction principle advanced by the City during the course of the trial is any more valid than the justifications advanced for the $1,000 and under practice at an earlier time. I find again, therefore, that the City's practice of paying judgments obtained by class members constituted a violation of the right of the class members to equal protection of the laws.

The justification offered by the City for preferential payment of contract judgments and judgments entered against enterprise entities is that it makes good sense. This, according to the City, is the practice of fund accounting. It makes sense, says the City, to put the burden of a judgment on the entity which should be generating the revenue to pay that judgment. I have no argument with that principle, nor do the plaintiffs. It seems to make good sense. That, however, is not the question.

The question is whether that justification is sufficient to explain a different treatment of judgments entered against the City on the basis of the conduct of other departments, such as the Police Department, Streets and Sanitation, whatever might be involved.

The testimony here, for instance, was that over 50 percent of the judgments entered against the City are for sidewalk fall-downs. Would it make sense from a fund accounting standpoint to say that the department in charge of maintaining the streets and sidewalks should be chargeable with payment of judgments arising out of negligence in connection with that duty? Would it make sense to say that the appropriation of the Police Department should be charged with the judgments that have to be paid because of misconduct of Police Department members?

The witnesses who testified in favor of the fund accounting approach gave no explanation as to why the fund accounting principle would not be equally applicable to those situations. Mr. Picur offered the statement, indeed, that such an approach would make good sense "internally" but would not be good from an "external" standpoint. Apparently I was supposed to guess what was meant by that. I can't. He did not give me enough clues. I see nothing in the evidence that supplies a rational justification for paying water judgments out of the water budget but not paying Police Department judgments out of the appropriation for the Police Department.

Now, turning to the other kinds of tort judgments, such as the employment discrimination judgments and the Shakman political activity judgments, the explanation offered by the City witnesses was the enterprise principle or fund principle

carried one step further. As Mrs. Gilliam indicated, the principal reason, or a principal reason, for paying Shakman judgments out of the department budget that happens to be involved is to punish that department for having caused the City to incur that liability. The theory, as is the theory, I suppose, of all punitive measures, is that by doing that, you can deter that kind of misconduct and save money in the long run.

I asked Mrs. Gilliam, in fact, whether her impression was that it was doing any good, and, as I expected, she was unable to furnish any statistical evidence that it was, but I got the impression that she thought that in the long run it was going to have a salutary effect. And I would be surprised if it did not because, as she pointed out, if the funds of the agency are needed for that purpose, they are not replenished from some other source. The agency simply has to eat that liability, and if that means cutting back on personnel or cutting back on something else that they might want to have, so be it.

That is, it seems to me, a very wise governmental police, at least in theory. How it works in practice, I certainly don't know, but I see no reason it should not work in practice. But another thing I cannot see is why it would not work equally well in practice with the Police Department. If you want to punish people for governmental misconduct, why not punish police officers who brutalize citizens and thereby in [sic] incur financial liability for the City. No rational basis for differentiation between a Shakman judgment and a police misconduct judgment was offered by the City.

To call it "fund accounting" is simply to describe what the City is doing; it is not to justify or explain what the City is doing in any way that would persuade the Court of a

justification for the different treatment. The Court has to cut through labels, cut through phrases like "fund accounting" and get down to the facts of the case. The facts of the case, it is clear to me, are that there is no principled way in which one can arrive at the conclusion that a rational distinction can be made between the tort judgments owned by the plaintiffs in this case and other judgments to which the City gave preference on the various theories I have just discussed.

The defendants argue that in order to establish that the prioritization policies of the City denied the plaintiffs equal protection of the laws, the plaintiffs must establish that absent that prioritization, there would have been enough money to pay the plaintiffs in a timely manner or at least in the same manner as all other judgment creditors were paid.

In short, the City says that if there was not enough money to pay everybody, then it is impossible for the plaintiffs to show that they were really hurt by the prioritization policy. And in any event, says the City, it is incumbent upon each plaintiff to demonstrate that but for the preferential payments made to other judgment creditors, his or her judgment would have been paid at some specific earlier date. Now, of course, the evidence does not meet that kind of standard, and if defendant is correct, the plaintiffs have not established a case of damages based upon equal protection violations.

I believe, however, that the City's argument is invalid. What the Constitution requires is that the City treat similarly situated people alike. The City paid various kinds of judgment creditors in a timely manner. It had enough money to do that. It also had the capability to raise enough money to treat everyone alike. It chose not to do so, and this brings us to the matter of chronic underbudgeting which has been

mentioned so frequently during this trial.

As I indicated at the outset of my remarks, it was the policy of the City to underbudget, to fail to levy and collect sufficient taxes to pay judgment creditors within a reasonable time. It is my view of the requirements of equal protection, and it is the only view that would make any sense to me, that if the City chooses to use tax money to pay some judgment creditors within 30 days, it must raise enough tax money to pay all similarly situated judgment creditors within the same time.

If that were not the law, then the City is really in a position to decide for itself if and when it can be regarded as having violated equal protection of the law. It can arbitrarily select a favored group, pay that favored group or render whatever kind of valuable service to that favored group it chooses to render and then deny similar treatment to other persons on the ground that the money is gone, it has no more money. That kind of argument simply cannot pass muster if the concept of equal protection is to have any substance.

I hold, therefore, that the City's intentional, chronic underbudgeting is part of the equal protection violation in that it prevented the City from having on hand enough money to pay all judgment creditors who were similarly situated in the same manner. The City can't have it both ways. It can't deliberately underbudget and yet make timely payment to certain selected creditors. If it chooses to underbudget, then it has to treat all creditors alike. They all have to share the misery.

The plaintiffs have argued that there was another category of judgment creditors who were given preferential treatment. I have named four: The thousand dollars and under, the

contract creditors, the enterprise creditors and the assorted special tort creditors such as the Shakman or employment discrimination creditors.

Plaintiffs seem to argue that there was a fifth group, and they were simply judgment creditors who were paid out of order according to some unknown and unspecified preferential policy of the City.

The evidence is insufficient to satisfy me that any custom or practice sufficient to satisfy the Monell Doctrine existed in that regard. There has been some evidence of some payments that were made obviously out of order, but in some of those instances there were explanations offered that might be sufficient, such as the evidence that there had been surety bonds posted in connection with some appeals that were taken from some judgments.

In short, we just do not have enough evidence here for me to conclude that there was any separate category of people we just might call favorite sons and daughters who were given preferential treatment, and I think that there has been no equal protection violation on that particular theory.

Just to make clear what my holding is on the liability portion of the equal protection analysis, I find that there has been an equal protection violation by the unjustified preferential payments made to judgment creditors of $1,000 and under, contract judgment creditors, enterprise judgment creditors, and assorted tort judgment creditors such as Shakman claimants.

I turn now to the question of damages. The liability question has not been altogether without difficulty. The damage question is even less so. The Evans and Balark classes have

stipulated with the City as to what their damages should be either on an approach based on the ensuing fiscal year or based on some time earlier than that. Because the equal protection analysis has nothing to do with a property right, I adopt the stipulation of the parties that the appropriate time at which judgments should have been paid was the 61st day after entry of judgment, and damages for the Evans/Balark class should be calculated pursuant to the stipulation of the parties on that basis.

A question may exist as to whether the preferential payments which constitute the equal protection violations were still being made after the last of the Evans plaintiffs was paid his judgment. That would have to do with the question of how long the damage period lasts. Plaintiffs have made what seems to me to be a valid argument in that regard; namely, that even after the City stopped making the preferential payments, the effects of the previously unconstitutional policy were still being felt in the backlog of unpaid judgments that had built up due to that practice. That backlog persisted long enough to cover the entire damage period for all of the plaintiffs in this case.

I turn now to the specific problems presented by the Collum class. These are the judgment creditors who sold their judgments to judgment buyers and are now seeking damages based upon the discounts they gave when they sold the judgments. Defendant argues that there is no evidence from which the Court can determine that the equal protection violations were a proximate cause of damage to the Collum class.

Let me say at the threshold of this analysis that the plaintiffs need only prove that defendants' unconstitutional

practices were a proximate cause of damage to the plaintiffs, not that those practices were the sole proximate cause of those damages.

That aside, I believe that it is readily inferable from the evidence that the only reason the Collum class members sold their judgments was to avoid the delay they knew they were facing in the payment of those judgments by the City. I can think of no other reason one would want to discount a judgment, nor did the defendant suggest any.

What the defendant does ask is why some judgment creditors sold their judgments and others did not. Why did some judgment creditors sell their judgments during periods of time when payment had not been delayed as long or was not being delayed as long as it was when other judgment creditors had not sold their judgments?

I don't know the answer to that question, nor does the evidence provide any conclusive answers. The one thing I believe is solidly established is that the only motivation that anyone had for selling a judgment was the desire to avoid a delay in payment that was considered intolerable or at least less tolerable than the payment of a discount.

The fact that some judgment creditors apparently decided to weather the delay for various reasons, including, in all likelihood, ignorance of the fact that they could sell their judgments, does not in any way break the causal nexus between the defendants' unconstitutional conduct and the decision of other judgment creditors to sell their judgments.

What the point raised by the City does suggest to me is that we are dealing with a different kind of damage question here than we are in the case of the Evans/Balark class. In the

latter situation, it is simply an undeniable fact the plaintiffs were not paid in a timely fashion in relation to other judgment creditors who were given preference, and they suffered the loss of the use of the funds for the period of the delay. Damages are a matter of computing the difference between the statutory rate of interest and the money that plaintiffs could have earned with the funds had they had them when they should have had them.

When we turn to the Collum class, however, we enter an area where questions of motivation and psychology enter into the determination of damages. I have indicated in connection with the Evans and Balark class that I think 60 days is the appropriate period within which their judgment should have been paid. Everyone agrees that that would have been a reasonable period of time, and as I indicated during the course of the trial, it is unlikely that I would have found a shorter period of time even in the absence of a stipulation of the parties.

What if back at the times in question here the City was delaying for 70 days before it paid judgments? That is 10 days longer than I am holding was reasonable. In those circumstances, would the members of the Collum class, despairing of timely payment, have been entitled to discount their judgments for a 10-day period and collect damages from the City based on that discount plus interest for the 10 days? As a strict matter of theory, maybe so, but the scenario, frankly, sounds ridiculous, doesn't it?

What this implies to me is that the difference between Evans/Balark, on the one hand, and Collum, on the other, can't be a simple matter of whimsy or arbitrary preference on the part of the judgment creditor whose payment is

admittedly likely to be delayed beyond a reasonable time. What constitutes an expectation that would justify a Collum class member in saying to himself or herself, "This is too long a period to ask me to wait; therefore, I am going to discount my judgment and seek damages from the City based on that discount"?

The City would probably argue that that has to be answered on a plaintiff-by-plaintiff basis with a separate hearing for each plaintiff. I have undertaken the trial of this case as a class action believing that it can be decided without an interminable multitude of individual evidentiary hearings for the various class members, and I still believe that. I do not think and will not pretend that we can arrive at a result here that is fine-tuned enough to satisfy the most fastidious, but you can't do that anyway in any kind of a trial. Evidentiary hearings for individual class members or not, we are still doing the best we can to approximate rough justice, substantial justice. This is what the parties are entitled to. It is all the Court is equipped to give in this or any other case.

I have reflected upon this problem, and realizing that you might get a different result for every person who undertook the project, I have decided that the Collum plaintiffs who are entitled to damages based upon their discounts are only those Collum plaintiffs who sold their judgments at a time when the City was delaying payment for long enough periods of time to justify those plaintiffs reasonably to conclude that discounting the judgment was economically preferable to waiting and collecting statutory interest. Now, that is the general statement of the rule which seems appropriate to me.

I don't know whether that is the easy part or the hard part, but, in any case, the next part is to arrive at that period of

time. I realize that it could vary from class member to class member, as I have indicated before, but I do believed that the standard is sufficiently objective to warrant a class-wide conclusion.

I hold that those Collum class members who assigned their judgments during periods when the delay by the city was a year or more are entitled to damages based upon the amount of their discounts, prorated over the period beginning 30 days after judgment became final until the date of the payment to the assignee, plus interest on that amount compounded annually at the three-year and one-year T-Bill rates of interest utilized in the Evans/Balark stipulation, which rates I find to be reasonable and equally applicable, even absent a stipulation to the Collum class.

For Collum class members who assigned their judgments at a time or times when the City was paying judgments within a year or less, they will receive regular Evans X-type damages computed on the same basis as the other Evans plaintiffs.

Now, when does the Collum damage period stop? I have tried to explain when I think it should start. When does it stop? Plaintiffs argue that it should not stop until entry of final judgment in this case. Defendants argue, I think correctly, that this would amount to prejudgment interest. It is by no means clear that the Collum plaintiffs are not entitled to prejudgment interest, any more than it is clear that the Evans/Balark plaintiffs are not entitled to prejudgment interest.

I have read the opinion of the Court of Appeals in Williamson v. Handy Button Machine Company again this morning, and the language of the Court in that case indicates that

plaintiffs in civil rights type cases should receive prejudgment interest where that is necessary to make them whole. They also point out, however, that that rule is not without exceptions, and one of the exceptions the Court talks about is a situation where it simply may be impossible to calculate prejudgment interest on any kind of rational basis, if you will pardon the expression.

Now, this case has been pending a very long time, as we all know. We are critical of the City for its delay in payment. I think the City could be equally critical of all of us for our delay in litigation. There have been many reasons for the delay. The case, as I have said before, is, I think, the most complex case I have ever dealt with as a Judge. I am not sure even now that I understand the full complexities of this case, and I do know that even those I understand I am not sure I know how to resolve. that is one reason it has taken so long.

Another reason it has taken so long is that counsel have tried to settle it, and I believe that both sides have exhausted their best efforts to do that and in good faith.A a great deal of time was spent working out a consent decree, which took care of many of the problems and obviated the need for further litigation of those issues. The appeal took some time.

There is no doubt that the Court's own schedule accounts for a great deal of the delay here. Had I had a lighter docket and time to spare, I probably would have been more aggressive in bringing this case to trial.

In any case, those are the reasons the case is 10 years old, and I do not blame anyone more than anybody else for the fact that the case is that old. I believe it would be unfair to visit the entire consequences of the delay on the City.

Prejudgment interest, if awarded, is designed to do equity, to do justice, to bring about fair compensation. Penalizing the City for the entire period of delay would not in my judgment do that.

The City has made other arguments as to why prejudgment interest is inappropriate, but the fact that it is not responsible for this long delay any more than anybody else is the principal basis for my decision that I will not award prejudgment interest until the date of judgment in this case.

Now, the next question is, can I think of any earlier date that can rationally be defended as a point up to which prejudgment interest should be awarded. I have thought about that: The date of the filing of the complaint, the date of my first decision, the date of the Court of Appeals' decision, the date of the consent judgment. But it is like throwing darts at a board. I would not feel comfortable intellectually with any of those dates.

I am going to deny prejudgment interest to the Collum class for the reason that no equitable time period for such interest to run occurs to me. I invite counsel between now and the time of entry of final judgment to give some thought to that question and suggest to me any rational basis you think you have for prejudgment interest up to a particular date. It can't be an arbitrary date, and it can't be any of the ones that I have mentioned unless you can think of reasons for those that I can't think of at this time.

Now, as those Collum plaintiffs who sold their judgments at times when the payment delay by the City was a year or less, their damages will be Evans/Balark damages up to the date their assignee was paid. I realize that such a recovery is not going to be as favorable as the one that was negotiated by

the Evans/Balark class for themselves, because it does not include any element of prejudgment interest.

On the other hand, to be consistent with what I said in regard to the other Collum plaintiffs, where I indicated that interest should be compounded, I will make the same holding in regard to the less-than-one-year Collum plaintiffs. Their interest should also be compounded. I believe that compound interest is entirely reasonable in the circumstances of this case, and the fact that the Evans plaintiffs compromised on that point should not affect the rights of the Collum plaintiffs.

There is a miscellaneous question to which I will now turn, and that is whether any of the plaintiffs are guilty of a failure to mitigate their damages. I hold that there is no evidence of failure to mitigate damages. The various remedies suggested by the City were simply not practicable in the circumstances shown by the evidence and would in all likelihood have been been unavailing if attempted.

Certainly the suggestion that plaintiffs should be faulted for failing to execute on the real and personal property of City employees is not practicable. That was amply demonstrated by plaintiffs' witness who testified on that subject. The idea of asking for a mandamus from the State Court or asking any Court to order immediate payment of judgment in the face of the entrenched policy of the City at that time and Section 9-104(a), whatever it was worth, were not practical solutions to the problems that the plaintiff judgment creditors faced. So I hold that the plaintiffs did not fail to mitigate their damages.

That concludes my findings and conclusions. I would now like to ask counsel how long it will take you to make the

necessary computations so that the proper amounts of damages can be set forth in the judgment order. This is aside from the question that I have suggested about prejudgment interest.

* * * [ending at page 36, line 23]

689 F.2d

In the

United States Court of Appeals

For the Seventh Circuit

Nos. 81-1150 & 81-1344

SYLVIA EVANS, Administrator of the Estate of ANDREW EVANS, Deceased,

Plaintiff-Appellant, Cross-Appellee,

v.

CITY OF CHICAGO, CLARK BURRUS and WILLIAM R. QUINLAN,

Defendants-Appellees, Cross-Appellants,

and

BERTHA BALARK, DANA BALARK, ANNE BALARK and DANE BALARK, by themselves and for all others similarly situated,

Plaintiffs-Appellants, Cross-Appellees,

v.

CITY OF CHICAGO, a municipal corporation; and DANIEL GRIM, as Comptroller of the City of Chicago,

Defendants-Appellees, Cross-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
Nos. 77 C 4119 & 79 C 1939—**John F. Grady**, *Judge*.

ARGUED MAY 28, 1981
RE-ARGUED JANUARY 6, 1982—DECIDED SEPTEMBER 27, 1982

Before SWYGERT and FAIRCHILD, *Senior Circuit Judges*, and THOMAS, *Senior District Judge*.*

FAIRCHILD, *Senior Circuit Judge*. After five days of trial in the Circuit Court of Cook County, Sylvia Evans settled her action against the City of Chicago (City) for the wrongful death of Andrew Evans. On January 30, 1976, the settlement resulted in the entry of a $67,500 judgment against the City.

In 1977, Bertha, Dana, Anne, and Dane Balark brought a civil rights action under 42 U.S.C. § 1983 against six City policemen. The parties settled that case. On April 10, 1979, the United States District Court, by stipulation, entered a judgment awarding $4,250 to each of the four Balarks. Ill. Rev. Stat., ch. 85, § 9-102 directs the City to pay tort judgments incurred by its employees while acting within the scope of their employment.

After learning that the City would delay paying the judgments for a considerable period, Evans and the Balarks brought separate 42 U.S.C. § 1983 class action suits, which raise constitutional challenges to: (1) the City's practices of (a) delaying payment of tort judgments and (b) paying tort judgments of $1,000 and less before paying larger judgments; and (2) certain Illinois statutes[1] which authorize or reflect the City's practices.

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* Senior District Judge Daniel Holcombe Thomas of the Southern District of Alabama sitting by designation.

[1] The challenged statutes are Ill. Rev. Stat., ch. 24, § 8-1-16 and ch. 85, § 9-104. Ill. Rev. Stat., ch. 24, § 8-1-16 provides:

> "In any municipality with a population of 500,000 or more the corporate authorities may levy a tax annually upon all the taxable property in the municipality at a rate that will produce not to exceed $4,500,000 upon the valuation to be ascertained by the assessment of such property for purposes of taxation for the year in which each such levy is made. This tax, if levied, shall be for the purpose of paying judgments entered against the municipality prior to January 1, 1941, and tort judgments and judgments for damage to or for the taking of private property for public use entered after January 1, 1941. This tax shall be levied and collected in the same manner as the general taxes of

(Footnote continued on following page)

[1] *continued*

the municipality. It shall be known as the judgment tax and shall be in addition to the maximum of all other taxes which the municipality is now, or may be hereafter, authorized by law to levy upon the aggregate valuation of all taxable property within the municipality.

"All money received from this tax shall be set apart in a separate fund and shall be used solely for the purpose of paying judgments as provided for in this section. Judgments against the municipality shall be paid out of this fund in the order in which the judgments were obtained. This order of payment shall not apply to judgments of $1,000 or less, which judgments may be paid out of said order and in the order in which these judgments of $1,000 or less were obtained.

"Interest accrued on these judgments shall be paid with the principal thereof. However, the interest accrued to any particular date on all judgments payable out of this fund may be paid ratably at any time without payment of the principal thereof. Warrants issued in anticipation of the judgment tax under the provisions of Sections 8-1-11 and 8-1-12 shall bear interest at a rate not to exceed 7% per annum."

Ill. Rev. Stat., ch. 85, § 9-104 provides:

"(a) If a local public entity does not pay a tort judgment or settlement during the fiscal year in which it becomes final and if, in the opinion of its governing body, the unpaid amount of the tort judgment is not too great to be paid out of revenues for the ensuing fiscal year, the governing body shall pay the balance of the judgment during the ensuing fiscal year.

"(b) If the local public entity does not pay the tort judgment or settlement during the fiscal year when it becomes final and its governing body is of the opinion that the unpaid amount of the judgment or settlement is so great that undue hardship will arise if the entire amount is paid out of the revenues for the ensuing fiscal year, the governing body shall pay the judgment or settlement, with interest thereon, in not more than 10 annual installments. Each payment shall be of an equal portion of the principal of the tort judgment or settlement. The governing body, in its discretion, may prepay any one or more installments or any part of an installment."

I. The City's Practice

The City pays tort judgments[2] of $1,000 or less as soon as the judgment holders present proper documents. After paying those judgments, the City applies the remainder of its tort judgment fund to pay all other tort judgments in the chronological order in which the Comptroller's staff has listed them in a bound book, called the "Judgment Record." The Comptroller's staff lists a judgment in the "Judgment Record" upon notification from the Corporation Counsel that all appeals have been completed or waived.[3]

In 1977, the waiting period for payment of tort judgments in excess of $1,000 was 36 months. In 1978, the period had increased to 41 months. In July 1979, the City owed $14 million in tort judgments. By September 1979, the waiting period had reached 47 months. The City pays interest at the statutory 6% rate at the time it pays the judgment. *See* Ill. Rev. Stat., ch. 74, § 3, repealed and recodified, 1981 Ill. Laws 82-280 §§ 19B-101 and 2-1303.

The delay in paying judgments resulted from the City's practice of: levying a $4.5 million tax each year for payment of tort judgments (an amount far less than the amount needed to pay the judgments entered against the City each year); selling tax anticipation notes for 75% of the levy; making the funds from the notes available to pay tort judgments; paying the principal and interest on the notes from the receipts of the tax levy; using the balance of the tax levy receipts to pay tort judgments; and refusing to apply any other revenue to paying tort judgments.

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[2] The City reduces to judgments all settlements in tort cases where suits have been filed against it. The City characterizes judgments in federal civil rights suits as tort judgments. This opinion adopts the City's characterization.

[3] Some confusion persists as to whether the City pays judgments which exceed $1,000 in the order of entry by the court or in the order of entry into the Comptroller's "Judgment Record." The defendants do not contend that this confusion concerns a material fact.

Eighty percent (80%)[4] of those who win tort judgments for more than $1,000 against the City sell their judgments. The purchasers buy the judgments at a discount which reflects their forecast of the length of the delay in payment and the difference between the prevailing market interest rates and the statutory interest rates.[5] In February 1976, some assignors discounted their judgments 13%. In 1980, discounts reached 20%. The plaintiffs assert that the discount rate subsequently reached 25%.

II. The District Court's Orders

The district court certified both the *Evans* and the *Balark* cases as class actions. The district court's class certifications group original tort judgment holders according to the length of time their judgments remain outstanding. Original tort judgment holders who were not paid before the end of the fiscal year following the fiscal year in which their judgments were entered are in the *Evans* class.[6] Shorter-term original tort judgment

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[4] We employ the plaintiffs' attorneys' representation to the trial court that 80% of the original holders of tort judgments assigned the judgments. (Tr. 10/15/80 at 8.) The defendants assert that up until 1979 discounters purchased 85 to 90% of the tort judgments against the City. We do not find the percentage of assignees relevant to our disposition.

[5] Prior to October 1, 1977, money judgments drew 6% interest per year. From then until January 1, 1980, judgments against the City and other governmental entities drew interest at 6% but other judgments drew 8%. Since January 1, 1980, judgments against non-govermental entities draw 9%. *See* Ill. Rev. Stat., ch. 74, § 3, repealed and recodified, 1981 Ill. Laws 82-280 §§ 19B-101 and 2-1303. *See also* 1979 Ill. Laws 81-874 § 1; 1977 Ill. Laws 80-722 § 1 and 80-914 § 1.

When the City, pursuant to Ill. Rev. Stat., ch. 85, § 9-102 pays judgments incurred by its employees acting within the scope of its employment, it apparently pays 6% interest.

[6] The *Evans* class was defined in a January 2, 1980 Order of Court to include:

> All persons in whose favor a final tort judgment in excess of $1,000.00 against the City of Chicago has been or will

(Footnote continued on following page)

holders comprise the *Balark* class.[7] *Evans v. City of Chicago*, 522 F.Supp. 789, 808 (N.D. Ill. 1980). The classification does not distinguish between judgments stemming from state law tort claims or federal civil rights claims; nor between judgments against the City alone or against both municipal officers or employees and the City. The court foresaw class members moving to the *Evans* class from the *Balark* class if they remained unpaid upon the conclusion of the fiscal year following the fiscal year in which their tort judgments were entered. 522 F.Supp. at 808-809.

On January 28, 1981, the district court consolidated the *Evans* and *Balark* cases for all future action including appeal. In response to the plaintiffs' motions for partial summary judgment and immediate payment, the district court, on January 28, 1981: (1) directed the City to pay immediately to all unpaid *Evans* class members

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[6] *continued*

have been entered commencing with the fiscal year 1972 and continuing to the date of the entry of final judgment in this case and payment of whose judgment is overdue by reason of the failure of the City of Chicago (a) to pay the judgment in full in the fiscal year it was entered or in full during the ensuing fiscal year in accordance with Ill. Rev. Stat., ch. 85, § 9-104(a); or (b) to commence timely payment of installments on the judgment pursuant to Ill. Rev. Stat., ch. 85, § 9-104(b) no later than the end of the first fiscal year following entry of judgment. The class shall not include assignees or purchasers of judgments nor those persons who assigned, factored or "discounted" their judgments prior to full or partial payment by the City of Chicago.

Evans v. City of Chicago, 522 F.Supp. 789, 803 (N.D. Ill. 1980).

[7] The *Balark* class was defined in the August 15, 1980 Memorandum Opinion of the Court to include:

> All persons in whose favor a final tort judgment in excess of $1,000.00 against the City of Chicago has been or will have been entered commencing with fiscal year 1974 who have held their judgments without full satisfaction thereof for a period not greater than the end of the fiscal year following the year in which the judgment was obtained.

522 F.Supp. at 810.

their judgments, costs, and unwaived statutory interest (Order, ¶8); (2) declared that Ill. Rev. Stat., ch. 85, § 9-104(b) failed to provide adequate procedural safeguards to the plaintiffs and other tort judgment holders and, on its face, violated the Fourteenth Amendment of the United States Constitution (Order, ¶4); (3) specified the minimum procedural safeguards constitutionally required before the City may decide to pay tort judgments in ten annual installments as permitted by Ill. Rev. Stat., ch. 85, § 9-104(b) (Order, ¶4); (4) enjoined the defendants' practice of paying judgments of $1,000 or less before earlier-entered, larger judgments (Order, ¶9); (5) declared the practice and Ill. Rev. Stat., ch. 24, § 8-1-16, to the extent the statute authorized the practice, unconstitutional for denying the plaintiffs equal protection of the laws (Order, ¶¶5 & 6); (6) reserved the question of attorneys' fees (Order, ¶10); and (7) declared the judgment final and appealable pursuant to Fed. R. Civ. P. 54(b) (Order, ¶7).

The plaintiffs appeal and the defendants cross-appeal from the January 28, 1981 order.[8]

III. The Plaintiffs' Appeal

The plaintiffs argue that the district court erred (1) in not holding Ill. Rev. Stat., ch. 85, § 9-104(a) facially unconstitutional on a motion for summary judgment; and (2) in certifying an impermissibly narrow subclass for immediate payment.

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[8] On February 2, 1981, subsequent to the filing of this appeal, the district court, in response to a motion by the plaintiffs for summary judgment on the issue of immediate payment, denied requests (1) to declare Ill. Rev. Stat., ch. 85, § 9-104(a) unconstitutional on its face; (2) to require the City to make immediate payment of all tort judgments which were older than thirty (30) days and had been entered against it during the 1980 fiscal year; and (3) to require the City to pay immediately assignees of all unpaid tort judgments. The district court did not approve 28 U.S.C. § 1292(b) or Fed. R. Civ. P. 54(b) certification for any of its February 2 rulings.

A. Constitutionality of Ill. Rev. Stat., ch. 85, § 9-104(a)

The plaintiffs argue that Ill. Rev. Stat., ch. 85, § 9-104(a) is unconstitutional on its face because at the moment a judgment is entered Illinois law grants the judgment holder a property right in the judgments; because a taking occurs from the date a judgment is entered against the City until the judgment is satisfied; and because § 9-104(a) permits such takings without providing for a hearing at a meaningful time and in a meaningful manner. The district court, in rendering the decision which it made final under Rule 54(b), did not reach plaintiffs' challenge to the constitutionality of § 9-104(a). Therefore the issue is not before us.

B. Class Definition

The entry of a final judgment under Fed. R. Civ. P. 54(b) allows this court to review the determination of the class found entitled to relief. *Wetzel v. Liberty Mutual Insurance Co.*, 508 F.2d 239, 245 (3d Cir.), *cert. denied*, 421 U.S. 1011 (1975). *See Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 443 (3d Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978). *See also Monarch Asphalt Sales Co. v. Wiltshire Oil Co.*, 511 F.2d 1073, 1077 (10th Cir. 1975) (class action reviewed on Rule 54(b) appeal by litigants denied intervention). *But see West v. Capitol Federal Savings and Loan Ass'n*, 558 F.2d 977, 982 (10th Cir. 1977) (Rule 54(b) final judgment of dismissal against putative class members does not make denial of a class certification appealable by named plaintiffs).

The plaintiffs argue that the district court certified an impermissibly narrow subclass for immediate payment. The formula "an impermissibly narrow subclass for immediate payment" invites confusion between the district court's determination that the plaintiffs constitute two distinct appropriate classes, its determination of the relief to which its summary judgment entitled each of the distinct plaintiff classes, and its determination, pursuant to Rule 54(b), that there was no just reason to delay entry of a final judgment granting the immediate payment relief to which its summary judg-

ment entitled one of the plaintiff classes. We review the class determination, but we reject the plaintiffs' attempt to draw within that review the constitutionality of Ill. Rev. Stat., ch. 85, § 9-104(a), an issue not reached in the decision made final under Rule 54(b).

The plaintiffs assert that the impermissible narrowness resulted because the court did not include assignees in the classes represented by the named plaintiffs, but did base the subclass determination upon Ill. Rev. Stat., ch. 85, § 9-104(a), a statute which the plaintiffs challenged as facially unconstitutional on a motion for summary judgment. We reject the plaintiffs' contentions.

We will overrule a denial of class certification only if the denial constitutes an abuse of the district court's discretion. *Adashunas v. Negley*, 626 F.2d 600, 605 (7th Cir. 1980). We apply the same standard to determine whether the district court certified an impermissibly narrow class.

1. Exclusion of Assignees From the Classes

None of the individual plaintiffs claim to be assignees. (Tr. 1/26/81 at 22.) An original judgment holder who does not purchase judgments at a discount has no interest which is furthered by delay. But an assignee who regularly purchases judgments at a discount may well have divergent interests. Although such an assignee may well want immediate payment of judgments already acquired, the assignee may balk at ending the systematic delays which make purchasing of judgments at discounts a potentially lucrative business. Furthermore, the district court judged that assignees were more likely than other tort judgment holders to be deemed to have waived their right to immediate payment.

In view of the sparse record and the class proponents' burden of showing the appropriateness of the class they propose, *see Valentino v. Howlett*, 528 F.2d 975, 978 (7th Cir. 1976), such considerations present questions of typicality and antagonistic interests sufficient to defeat the plaintiffs' claim that the district court abused its discretion when it declined to include assignees in the class

the named plaintiffs represented. *Garonzik v. Shearson Hayden Stone, Inc.*, 574 F.2d 1220, 1221 (5th Cir. 1978), *cert. denied*, 439 U.S. 1072 (1979). *See General Telephone Co. v. Falcon*, 50 U.S.L.W. 4638, 4641 n. 13 (June 14, 1982).

2. Basing Classes Upon A Challenged Statute

The remainder of the plaintiffs' argument on the class certification is primarily an attempt to prove that Ill. Rev. Stat., ch. 85, § 9-104 is unconstitutional and that consequently the *Balark* class is entitled to immediate payment. No final judgment determined the constitutionality of that statute or the validity of the *Balark* class' claim to present payment of their tort judgments. Our review of the district court's class determinations does not render those matters reviewable.

Furthermore, the plaintiffs' argument fails because it assumes that the district court must determine the validity of a challenged statute before the court may base class distinctions upon the statute's provisions. On the contrary, as long as diverse groups of plaintiffs may advance differing arguments against the validity of a statute or the statute's provisions render it more vulnerable to attack by one group, the district court does not abuse its discretion by defining the groups as distinct classes despite the fact that all the plaintiffs may advance one common argument alleging the facial unconstitutionality of the statute.

Ill. Rev. Stat., ch. 85, § 9-104, envisions two distinct contingencies: one in which the governing body of a local public entity believes the unpaid balance of a tort judgment is not too great to be paid in the fiscal year following the fiscal year in which the judgment becomes final and the other in which the governing body believes undue hardship will arise if the entire unpaid amount is so paid. As to any unpaid judgment, as long as the fiscal year after the year in which the judgment became final has not expired, there remains the possibility of compliance with the statute by full payment or commencement of installment payment. After the expiration of such

period, however, the statute no longer provides or implies any obstruction to entitlement to immediate payment. The specifications of the *Evans* and *Balark* classes recognize this difference in the position of a judgment holder depending on the age of his judgment. Despite the challenge to the statute's constitutionality, the district court did not err in using its provisions to place the plaintiffs in distinct classes.

IV. The Defendants' Cross-Appeal

The defendants argue[9] that the district court erred: (1) in refusing to abstain; (2) in holding that they deprived the plaintiffs of property within the meaning of the Fourteenth Amendment; (3) in ordering immediate payment; (4) in holding Ill. Rev. Stat., ch. 85, § 9-104(b) unconstitutional; (5) in declaring the minimum procedural safeguards required before the City may constitutionally decide to pay judgments in ten annual installments; and (6) in holding the priority given judgments of $1,000 or less a denial of equal protection.

A. Abstention

In a limited number of exceptional circumstances, the judicially created abstention doctrine properly may lead a federal court to decline to exercise its jurisdiction so that a state court or agency may decide an issue. The defendants argue that the district court erred by not abstaining under theories derived from *Younger v. Harris*, 401 U.S. 37 (1971) and *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943).[10] We disagree.

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[9] At oral argument the defendants abandoned their assertion that the plaintiffs had made knowing and intelligent waivers of their due process rights.

[10] The defendants do not contest the district court's rejection of abstention based on *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941).

The *Evans* suit began in November 1977; the *Balark* in May 1979. In June 1979, the defendants, who in the *Evans* case had already filed four motions to dismiss and two motions for summary judgment, filed motions which requested the district court to abstain in both cases. The motions called to the court's attention a state lawsuit, *Nebel v. City of Chicago*, 75 CH 700 (Cir. Ct. Cook Co. Ch.), which also challenged the City's practice of delaying payment of tort judgments. Nebel had filed suit on February 4, 1975. The *Nebel* suit was dismissed initially, but a September 27, 1977 Appellate Court decision established Nebel's right to proceed on behalf of the class of persons who held judgments against the City or its agents. *Nebel v. City of Chicago*, 53 Ill. App.3d 890, 369 N.E.2d 74 (1st Dist., 2d Div. 1977).

The district court, in an opinion dated July 9, 1979, denied the defendants' motion to abstain in *Evans*. In an opinion dated August 15, 1980, the district court applied its *Evans* ruling to the *Balark* case. *Evans v. City of Chicago*, 522 F.Supp. at 795-96.

On October 30, 1979, the state court certified the *Nebel* plaintiff class: "all unpaid tort judgment creditors of the defendant, THE CITY OF CHICAGO, as of the date of this order." *Waters v. City of Chicago*, 95 Ill. App.3d 919, 920, 420 N.E.2d 599 (1st Dist., 2d Div. 1981). On November 16, 1979, the parties in *Nebel* filed a stipulation regarding a proposed compromise. With minor modifications this stipulation forms the basis for the settlement of the state court case. The settlement provides: that the City allot $9 million in each of three annual budgets (1980, 1981, and 1982) to pay tort judgment creditors; that by January 1, 1983, the City will budget an amount sufficient to pay all outstanding tort judgments; that attorneys' fees be paid from those funds; and that a trustee administer the fund. On February 20, 1980, the *Nebel* court entered a final settlement order.

On January 28, 1981, the district court entered the judgment now here on appeal. On April 21, 1981, the Illinois Appellate Court vacated and remanded the *Nebel* settlement. The Appellate Court held that the trial

court's approval of the settlement was an abuse of discretion because holders of judgments of less than $1,000 were assessed for the trustee's and attorneys' fees without having received any benefit or a proper opt-out notice. *Waters v. City of Chicago*, 95 Ill. App.3d at 925. The state court plaintiffs and the City have revised the settlement so that no attorneys' or trustee's fees are assessed against holders of tort judgments which do not exceed $1,000. The Circuit Court of Cook County has approved the revised settlement.

1. Younger Abstention

Although this litigation in the federal courts partially overlapped the litigation initiated by Nebel in the state court, it did not fall within the appropriate bounds for *Younger* abstention. The vast majority of the cases which *Younger* has spawned have abstained from injecting the federal judiciary into a state initiated adjudication pending in a state forum. *See e.g., Samuels v. Mackell*, 401 U.S. 66 (1971) (request for declaratory relief against pending state prosecutions); *Moore v. Sims*, 442 U.S. 415 (1979) (requested injunction against state Department of Human Resources' suit to affect a parent-child relationship). The exceptional *Younger* progeny which did not involve pending state initiated proceedings abstained from considering relief which would operate directly against a state court. *See e.g., Juidice v. Vail*, 430 U.S. 327 (1977) (attempt to enjoin state justices from using an allegedly unconstitutional law to impose contempt sanctions); *Parker v. Turner*, 626 F.2d 1, 6-10 (6th Cir. 1980) (declaratory and injunctive relief to ensure that a state juvenile court followed due process); *Gresham Park Community Organization v. Howell*, 652 F.2d 1227 (5th Cir. 1981) (attempt to enjoin enforcement of a state court injunction). *See also Fair Assessment In Real Estate Association, Inc. v. McNary*, 50 U.S.L.W. 4017, 4020 (Dec. 1, 1981); *Etlin v. Robb*, 50 U.S.L.W. 3998.17 (June 28, 1982) (White, J., dissenting from denial of *certiorari*).

The state court settlement did not resolve nor completely obviate any of the constitutional challenges. The

failure of the state litigation to reach these questions did not result from any action of the federal judiciary.[11] None of the named plaintiffs in the federal litigation actively participated in the state litigation,[12] which was not instituted by the defendants. Nor was the goal of plaintiffs' suit federal relief which would operate directly against a state court. Under the circumstances *Younger* does not apply.

2. Burford Abstention

Burford abstention is appropriate only if federal review of a difficult question of state law would disrupt state efforts to establish a coherent policy respecting a matter whose importance transcends the result in the case under consideration. *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 814 (1976); *Ryan v. State Board of Elections*, 661 F.2d 1130, 1135 (7th Cir. 1981). But no doctrine requires abstention

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[11] On February 28, 1980, after the Circuit Court of Cook County entered the settlement order, the district court, after a hearing at which the trustee appointed by the state court appeared as a friend of the court, entered an order temporarily restraining the City from paying any tort judgment in excess of $1,000 and from deducting any attorneys' fees from any such judgment. On March 5, the district court dissolved the temporary restraining order. In considering the abstention question, we need not decide whether the district court acted properly in issuing the temporary restraining order, for the order did not ultimately deflect the state proceedings from their course.

[12] At oral argument counsel informed us that Evans opted out of the state class and that the Balarks did not. The state court denied a motion by Evans' attorney to exclude the *Evans* class from the *Nebel* settlement. The City did not base a *res judicata* defense upon the settlement, *see Allen v. McCurry*, 449 U.S. 90 (1980), or argue that the district court should have modified the federal classes to avoid any overlap with those defined by the state court. The state litigation did not seek and has not resulted in all the relief the federal plaintiffs seek. As of January 1982, the City had reduced its backlog but remained 26 months behind.

merely because resolution of a federal question may invalidate a state statute or overturn a state policy. *Zablocki v. Redhail*, 434 U.S. 374, 380 n. 5 (1978).

Colorado River Water Conservation District, 424 U.S. 800, indicates the limited scope of *Burford* abstention. In *Colorado River*, the United States sought a declaration of its federal and state law rights in certain Colorado rivers and streams. The Court recognized that probably "no problem of the Southwest section of the Nation is more critical than that of scarcity of water"; that Colorado had established an elaborate regulatory scheme for adjudication of water rights disputes; that the United States had utilized Colorado's scheme before, 424 U.S. at 804-806; and that a federal adjudication of water rights might conflict with the State's allocation of water rights, 424 U.S. at 815-16. Nevertheless, the Court held the State's interests did not justify *Burford* abstention. 424 U.S. at 815.

Neither does this case.

The defendants characterize the regulation and enforcement of state court judgments and the management of municipal budgets as matters of transcendent importance regarding which Illinois has established coherent policies which federal litigation threatens to disrupt. Without denigrating the seriousness of the interests cited, we note several factors which weigh against *Burford* abstention. (1) None of the statutes requires the City to adopt the practices in question, and Ill. Rev. Stat., ch. 24, § 8-1-16 applies only to the City of Chicago and not to any other Illinois municipal corporation. *See Heritage Farms, Inc. v. Solebury Township*, 671 F.2d 743, 747 (3d Cir. 1982), *cert. denied*, 50 U.S.L.W. 3934 (May 24, 1982). (2) The statutes in question are not especially complex nor do they form part of a complex scheme. *See Knudsen Corp. v. Nevada State Dairy Commission*, 676 F.2d 374, 377 (9th Cir. 1982); *Hanna v. Toner*, 630 F.2d 442, 446 (6th Cir. 1980), *cert. denied*, 450 U.S. 919 (1981). (3) Illinois has not created a public agency or special system of judicial review nor otherwise indicated that the matter in question requires specialized expertise. *Knudsen Corp. v. Nevada State Dairy*

Commission, 676 F.2d at 377; *Nasser v. City of Homewood*, 671 F.2d 432, 440 (11th Cir. 1982); *Three Rivers Cablevision, Inc. v. City of Pittsburgh*, 502 F.Supp. 1118, 1125-26 (W.D. Pa. 1980). (4) The litigation involves the City's delay in paying federal as well as state court judgments.

We conclude that the issues in question do not fall within the area of a complex but coherent state policy. Therefore we approve the district court's refusal to abstain under *Burford*.

B. Deprivation of Property Within the Fourteenth Amendment

The defendants do not dispute that they committed the relevant conduct under color of state law. *See Monroe v. Pape*, 365 U.S. 167 (1961); *Parratt v. Taylor*, 451 U.S. 527, 535-36 (1981). They do dispute the other essential element of a § 1983 action: that the conduct deprived the plaintiffs of rights, privileges, or immunities secured by the Constitution or laws of the United States. *See Parratt v. Taylor*, 451 U.S. at 535. They specifically dispute the trial court's conclusion that they have deprived the plaintiffs of property within the meaning of the Fourteenth Amendment.

The Constitution does not create property interests. But property interests "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law[,] . . . that secure certain benefits, and that support claims of entitlement to those benefits." *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972).

Recent Supreme Court cases emphasize that the hallmark of property "is an individual entitlement grounded in state law, which cannot be removed except 'for cause.' . . . . Once that characteristic is found, the types of interests protected as 'property' are varied and, as often as not, intangible, relating 'to the whole domain of social and economic fact.'" *Logan v. Zimmerman Brush Co.*, 50 U.S.L.W. 4247, 4250 (Feb. 24, 1982).

Under Illinois law, a judgment becomes a vested right of property once it is no longer subject to review or modification. *Arnold & Murdock Co. v. Industrial Commission*, 314 Ill. 251, 255; 145 N.E. 342 (1924). *See Smolen v. Industrial Commissioner*, 324 Ill. 32, 34-35, 154 N.E. 441 (1926). Illinois law does not allow holders of judgments against municipal corporations to collect by execution against the property of the municipal corporation. *City of Chicago v. Hasley*, 25 Ill. 595 (1861); *Moore v. Town of Browning*, 373 Ill. 583, 588, 27 N.E.2d 533 (1940). Nevertheless, Illinois recognizes that a city has no higher duty than to pay the judgments against it and that it has no discretion to depart from statutory methods of payment. *People ex rel. Farwell v. Kelly*, 367 Ill. 616, 618-19, 12 N.E.2d 612 (1937). Furthermore, Illinois acknowledges that the money awarded in an eminent domain proceeding is the condemnee's property even during the pendency of the condemnee's appeal, when, pursuant to statute, the county treasurer withholds it. Thus, although no statutory provision authorizes the payment of interest on eminent domain awards deposited with the county treasurer, the condemnee must receive whatever income such an award earns if invested by the treasurer. *Morton Grove Park Dist. v. American National Bank*, 78 Ill.2d 353, 362, 399 N.E. 2d 1295 (1980).

Ill. Rev. Stat., ch. 85, § 9-102 empowers and directs a local public entity "to pay any tort judgment or settlement for which it or an employee while acting within the scope of his employment is liable in the manner provided in this Article."

In the event a local public entity does not pay a tort judgment during the fiscal year in which it becomes final, § 9-104 provides for two contingencies: one in which the governing body forms the opinion that the unpaid amount of the tort judgment is not too great to be paid out of the revenues for the ensuing fiscal year; the other in which the governing body forms the opinion that the unpaid amount is so great that undue hardship will arise if the entire amount is so paid. In the first contingency, § 9-104(a) directs the governing body to

pay the balance of the judgment during the ensuing fiscal year. In the second, § 9-104(b) directs the governing body to pay the balance, with interest, in not more than ten annual installments.

Section 9-105 authorizes the boards of local taxing entities to issue bonds for the payment of any and all outstanding tort judgments and removes such bonds from all statutory limitations upon the amount of such entities' debt.

Section 9-106 directs local public entities that derive revenue for maintenance and operations from rates and charges for services or facilities to provide funds in each fiscal year to pay all their tort judgments.

Section 9-107 authorizes local public entities annually to levy or have levied on their behalf taxes sufficient to pay the cost of judgments under § 9-102, to pay the costs of and principal and interest on bonds issued under § 9-105, and to pay tort judgments under § 9-104 to the extent necessary to discharge such obligations. Section 9-107 exempts taxes for tort judgments from limitations upon both the amount of taxes the entities may levy for general purposes and the percentage of the assessed valuation upon which taxes are required to be extended for the entities.

Ill. Rev. Stat., ch. 74, § 3 mandates that judgments shall draw interest from the date of the judgment.

Property is more than mere ownership. It includes the right to acquire, use, enjoy, and dispose of acquisitions subject only to the law of the land. *Morton Grove Park Dist. v. American National Bank*, 78 Ill.2d at 362. *See Buchanan v. Warley*, 245 U.S. 60, 74 (1917). Only one Illinois statute, ch. 85, § 9-104(b), authorizes delay in the payment of tort judgments beyond the end of the fiscal year following the year the judgment became final. That statute specifies a procedure which the City admits it has not invoked.

Upon review of the relevant statutes and decisions, we agree with the district court that under Illinois law, if the City has not invoked § 9-104(b) before the end of the

fiscal year following the year in which the tort judgment became final, the tort judgment holder may legitimately claim entitlement to immediate payment. Thus, at least in that situation, the right to immediate payment of a tort judgment against a municipal corporation becomes a property right under Illinois law.

Delay beyond that time although only a temporary and nonfinal withholding of the plaintiffs' property is a "deprivation" within the meaning of the Fourteenth Amendment.[13] *Fuentes v. Shevin*, 407 U.S. 67, 85 (1972); *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 339 (1969). The contrast between current market interest rates and the statutory rate on a judgment emphasizes the impact of delay.

C. Due Process

The only possible justification for noncompliance with § 9-104(a) is a proposal, on account of undue hardship, to pay in ten installments under § 9-104(b). Since the City concedes it is not resorting to § 9-104(b), there is no

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[13] The property interest in immediate payment created by Illinois law distinguishes this case from *Louisiana ex rel. Folsom v. Mayor of New Orleans*, 109 U.S. 285, 289 (1883). In *Louisiana ex rel. Folsom*, the judgment holder apparently only claimed a property interest in the judgments themselves and in the prior, less restrictive limitation upon the taxing power of New Orleans. At least those are the only asserted deprivations which the Court discussed. The Court did not indicate that Louisiana had established a right to immediate payment of the judgment in question.

If one reads *Louisiana ex rel. Folsom* as applying to state created property interests in immediate payment of judgments, it appears inconsistent with the application of the due process clause to temporary nonfinal deprivations in *Fuentes v. Shevin*, 407 U.S. 67, 85 (1972) and *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 339 (1969).

Furthermore, the City directly deprived the plaintiffs of an unqualified right created by Illinois law whereas the 1879 Louisiana Constitution allowed other provisions for the satisfaction of judgments.

justification for failure to comply with § 9-104(a), and thus nothing to be determined at a hearing. Although a hearing can be an element of due process, takings without any justification are "governmental actions that even if undertaken with a full panoply of procedural protection, are in and of themselves, antithetical to fundamental notions of due process." *Parratt v. Taylor*, 451 U.S. at 545 (Blackmun, J., concurring).

In *Parratt v. Taylor*, 451 U.S. 527, the Court concluded that a prisoner suffered a deprivation of property within the meaning of the Fourteenth Amendment when a state employee negligently lost the prisoner's hobby kit. The Court, however, held that the State's tort claims procedure provided all the process due. The defendants maintain that under *Parratt* Illinois provides due process via a judicial procedure to which plaintiffs could resort to compel the City to comply with § 9-104(a).

This argument misses *Parratt's* point. In *Parratt*, the Court emphasized that it confronted "a tortious loss of . . . property as a result of a random and unauthorized act by a state employee . . . not a result of some established state procedure." 451 U.S. at 541. Therefore, the Court found it difficult "to conceive of how the State could provide a meaningful hearing before the deprivation takes place." *Id.* Here, in contrast, the City has systematically deprived the plaintiffs of their State created right to immediate payment. *Parratt* does not reach such conduct. *Logan v. Zimmerman Brush Co.*, 50 U.S. L.W. at 4251.

Logan supports Justice Blackmun's view that the *Parratt* opinion has a narrow reach and does not "suggest that the provision of 'postdeprivation remedies,' . . . within a state system would cure the unconstitutional nature of a state official's intentional act that deprives a person of property." *Parratt v. Taylor*, 451 U.S. at 545-46 (Blackmun, J., concurring).

Furthermore, the state remedies cited by the defendants[14] have never been used to obtain compensation for the City's use of judgment holder's property during the time the City withheld payment without statutory authorization. *See Bonner v. Coughlin*, 517 F.2d 1311, 1319 (7th Cir. 1975), *modified in banc*, 545 F.2d 565 (1976), *cert. denied*, 435 U.S. 932 (1978). We do not understand that *Parratt* remits the victims of a deliberate municipal policy to a speculative remedy. *See Logan v. Zimmerman Brush Co.*, 50 U.S.L.W. at 4251.[15]

D. Ill. Rev. Stat., ch. 85, § 9-104(b)

The record discloses that the governing body of the City never determined that undue hardship would arise if the entire amount of unpaid judgments were paid out of revenues for the fiscal year following the fiscal year in which the judgments became final. Furthermore, the City never subjected the named plaintiffs or any class member to the installment plan method of payment per-

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[14] The defendants cite three state remedies: (a) a common law action for immediate payment of a tort judgment; (b) a writ of mandamus; and (c) wage garnishments against individuals also bound by the judgments against the City. The City does not characterize its seizure as an exercise of eminent domain. Even if eminent domain applies to what is essentially a seizure of cash and equal protection analysis tolerates the City's method of selecting those from whom it seizes property that is fungible with that possessed by a much larger class, just compensation would be due in an amount which could not be less than the judgments the district court ordered paid immediately.

[15] *Flower Cab Company v. Petitte*, No. 82-2208, August 4, 1982, is a decision of this court granting a stay of a mandatory injunction, pending appeal. *Flower Cab* considered it probable that under the principle of *Parratt*, the availability of mandamus by a state court to compel a ministerial act will fulfill the requirement of due process. The panel does not appear to have considered *Logan v. Zimmerman Brush Co.* in interpreting *Parratt*. In any event, the *Flower Cab* pronouncement was tentative, in the context of a stay pending appeal, and the fact situation presented there was distinctly different from that which is before us here.

mitted by Ill. Rev. Stat., ch. 85, § 9-104(b). Nor did the City ever tell the named plaintiffs or any class member that it would implement such a plan. Thus the plaintiffs had no standing to attack the constitutionality of that provision. *Blum v. Yaretsky*, 50 U.S.L.W. 4859, 4861 (June 25, 1982); *Alabama State Federation of Labor v. McAdory*, 325 U.S. 450 (1945). Because the district court improperly reached this issue, we vacate paragraph four of the district court's January 28, 1981 order, which declared Ill. Rev. Stat., ch. 85, § 9-104(b) unconstitutional and set forth the minimum procedural safeguards which due process requires before the City may decide to pay a judgment in installments over ten years. In vacating this portion of the court's order, we, of course, express no opinion about the constitutionality of the statute or the appropriateness of the order's procedural safeguards.

E. Equal Protection

In holding unconstitutional the City's practice[16] of paying tort judgments of $1,000 or less immediately while delaying payment of larger tort judgments for several years, the district court applied the equal protection analysis set forth in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973). Under

[16] Neither side disputes the trial court's view that the City's practice of giving priority to judgments of $1,000 or less did not originate in Ill. Rev. Stat., ch. 24, § 8-1-16. *Evans v. City of Chicago*, 522 F.Supp. at 801. That statute allows the City to levy a limited judgment tax in addition to the maximum of all other authorized taxes and exempts judgments of $1,000 or less from its requirement that judgments the City pays out of the separate fund received from that tax be paid in the order the judgments were obtained. But Ill. Rev. Stat., ch. 85, § 9-105 to § 9-107 removes payments of tort judgments from all statutory taxation and debt limitations. Therefore the more limited relaxation of the statutory limitations permitted by Ill. Rev. Stat., ch. 24, § 8-1-16, along with the accompanying requirements and exemptions no longer applies to the City's tort judgment payment practices.

that analysis, in economic matters a nonsuspect classification created by statute will survive a constitutional challenge if the classification relates to a legitimate state purpose. Both sides agree that this standard controls.

The defendants contend that the City's practice of paying tort judgments of $1,000 or less before tort judgments in excess of $1,000 related rationally to the City's attempt to reduce litigation and interest costs by encouraging quick settlements for $1,000 or less without interest in a large amount of nuisance litigation. The explanation does not survive examination for two reasons. First, the City's practice included immediate payment of fully litigated claims which resulted in judgments of $1,000 or less. Second, the practice did not reduce interest costs since interest accumulated on the sum of the unpaid judgments. The priority given smaller judgments did not reduce that total. Nor does the payment of many small judgments before an equal amount due on large judgments allow the City more effectively to manage its yearly appropriations and limit the City's debt. We discern no rational basis for the City's challenged classification.[17] *See Zobel v. Williams*, 50 U.S. L.W. 4613, 4614 (June 14, 1982). The district court correctly held the practice and Ill. Rev. Stat., ch. 24, § 8-1-16, insofar as the statute incorporates the practice, unconstitutional.

[17] The plaintiffs allege that the pressure the City's practice puts on claimants to settle for $1,000 or less because of the time the City takes to pay larger judgments is the only way in which the practice can limit the City's debt. The city does not assert and we do not believe that a rational basis for the City's disparate treatment of the two classes of tort judgment holders may be found in the possibility that the city might exploit the willingness of those adversely affected by an arbitrary classification to sacrifice part of their claims in order to escape the undue delay the City imposes upon the class it disfavors.

V. Conclusion

For the foregoing reasons the district court's judgment, with the exception of paragraph four is AFFIRMED.[18] Paragraph four is VACATED.

The parties shall bear their own costs of appeal.

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[18] Section 9-104(a), in limiting the time within which a judgment must be paid, classifies judgments according to the fiscal year in which the judgment becomes final. Presumably finality is achieved when the time for appeal expires without an appeal, or when appellate proceedings have been completed.

The district court defined the *Evans* class in terms of the fiscal year in which a judgment was entered. Unless "entered" is taken to mean entry into the Comptroller's "Judgment Record" immediately upon becoming final, see note 3, it is likely that there are judgments entered in one fiscal year which do not become final until the following fiscal year, and where an appeal has been taken, the disparity may be greater. The parties have not made any issue over the possible difference between requiring payment at or before the end of the fiscal year following the fiscal year of entry of judgment and requiring payment at or before the end of the fiscal year following the fiscal year in which the judgment became final. Although we affirm the judgment, the district court is given leave to adjust it to be consistent with § 9-104 should the defendant seek that change.

Furthermore, the district court's judgment does not unambiguously incorporate the court's intent that the judgment act prospectively to require immediate payment to present members of the *Balark* class at the time they move into the *Evans* class. Should a party seek to clarify this aspect of the judgment, the district court may do so.

THOMAS, *Senior District Judge*, dissenting.

I respectfully dissent in part to the majority opinion. I feel that the question of the constitutionality of both 104(a) and (b) was squarely before the district and there was error for the district court not to rule on both. Even though the district court did not certify his ruling under Rule 54(b), I think it should have been so certified and it is before this court. I would hold both 104(a) and (b) unconstitutional and concur in the rest of the majority opinion.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 87-3006 and 87-3085

SYLVIA EVANS, et al., *Plaintiffs-Appellees,*

v.

CITY OF CHICAGO, et al., *Defendants-Appellees.*

BERTHA BALARK, et al., *Plaintiffs-Appellees,*

v.

CITY OF CHICAGO, et al., *Defendants-Appellants.*

CURTIS COLLUM, et al., *Plaintiffs-Appellees, Cross-Appellants,*

v.

CITY OF CHICAGO, et al., *Defendants-Appellees. Cross-Appellees.*

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
Nos. 77 C 4419, 79 C 1939, 79 C 2493, **John F. Grady,** *Judge.*

[April 27, 1989]

JUDGMENT — ORAL ARGUMENT

HON. WILLIAM J. BAUER, Chief Judge
HON. HARLINGTON WOOD, Jr., Circuit Judge
HON. KENNETH F. RIPPLE, Circuit Judge

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in

this cause appealed from be, and the same is hereby REVERSED, in accordance with the opinion of this Couirt filed this date. Costs on this appeal are waived.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 87-3006 and 87-3085

SYLVIA EVANS, et al., *Plaintiffs-Appellees,*

v.

CITY OF CHICAGO, et al., *Defendants-Appellees.*

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Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
Nos. 77 C 4419, 79 C 1939, 79 C 2493, **John F. Grady,** *Judge.*

[August 25, 1989]

ORDER

HON. WILLIAM J. BAUER, Chief Judge
HON. HARLINGTON WOOD, Jr., Circuit Judge
HON. KENNETH F. RIPPLE, Circuit Judge

On consideration of the petition for rehearing filed in the above-entitled cause by counsel for plaintiffs-appellees Bertha Balark, et al., and Curtis Collum, et al., on May 11, 1989, all of the judges on the original panel having voted to deny the same, IT IS HEREBY ORDERED that the aforesaid

petition for rehearing be, and the same is hereby, DENIED.

On consideration of the petition for rehearing and suggestion for rehearing in banc filed in the above-entitled cause by counsel for plaintiff Sylvia Evans on May 11, 1989, no judge in active service has requested a vote thereon and all of the judges on the original panel having voted to deny the same, According,

IT IS HEREBY ORDERED that the aforesaid petition for rehearing and rehearing in banc be, and the same is hereby, DENIED.

Supreme Court, U.S.
FILED
MAY 3 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1191

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

SYLVIA EVANS, BERTHA BALARK, and CURTIS COLLUM, Individually, and on Behalf of Those Similarly Situated,

Petitioners,

v.

CITY OF CHICAGO,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTION PRESENTED

Whether the Seventh Circuit correctly applied the rational-relationship test and the doctrines of waiver and law of the case to the facts presented.

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No. 89-1191

IN THE

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OCTOBER TERM, 1989

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Petitioners,

v.

CITY OF CHICAGO,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

STATEMENT OF THE CASE

Evans v. City of Chicago ("Evans I")

The class-action complaints filed by Sylvia Evans ("Evans class"), Bertha Balark ("Balark class"), and Curtis Collum ("Collum class") each alleged that the practice of the City of Chicago ("City") in not paying its tort judgments promptly violated both the equal protection and the due process

clauses of the fourteenth amendment, even though the City ultimately paid all tort judgments with statutory interest. On January 2, 1980, the district court certified the Evans class. On August 15, 1980, the district court certified the Balark and Collum classes.

The district court, on January 28, 1981, issued a judgment order declaring, *inter alia*, that the City's practice of paying tort judgments of $1,000 or less before paying larger tort judgments violated the equal protection clause.[1] On appeal, the Court of Appeals for the Seventh Circuit affirmed that portion of the judgment.[2] *Evans v. City of Chicago*, 689 F.2d 1286, 1299-1300 (7th Cir. 1982) ("*Evans I*"); *see also* Item 3, Appendix to Petition for Certiorari at 22-23. Subsequently, on May 30, 1984, the parties entered into a consent decree that provided for prompt payment of tort judgments unpaid as of December 31, 1983 and also provided for timely payment of tort judgments payable on or after January 1, 1984. The decree remains in effect, although on November 24, 1989, two months be-

[1] The court also declared § 9-104(b) of the Local Government and Governmental Employees Tort Immunity Act, III. Rev. Stat. ch. 85, § 9-104(b) (1981) ("Tort Immunity Act"), a provision permitting a 10-year payout of tort judgments plus interest not paid within the fiscal year in which the judgment becomes final, facially unconstitutional as violating procedural due process. The court did not enter findings of fact or conclusions of law as to § 9-104(a) of the Tort Immunity Act which permits payment of tort judgments in the next ensuing fiscal year after the fiscal year in which the judgment became final. *Id.* § 9-104(a).

[2] However, the Seventh Circuit vacated the declaration that § 9-104(b) of the Tort Immunity Act violated procedural due process, concluding that the district court should not have reached the issue because the City had never invoked the provision as justification for its tort-payment practices. *Id.* at 1299. Finally, the *Evans I* court declined to adjudicate the facial constitutionality of § 9-104(a) because the district court had not reached the issue. *Id.* at 1291-92.

fore the present petition for certiorari was filed, the City moved to vacate the decree in light of *Evans II*. No ruling has been made on the City's motion.

Evans v. City of Chicago ("Evans II")

These cases then returned to the district court for a trial on damages for the over-and-under $1,000 equal protection violation. However, the trial was not limited to damages but became a relitigation of the original equal protection violation; a litigation of additional equal protection violations; and, finally, a litigation of the substantive and procedural due process validity of § 9-104(a) of the Tort Immunity Act.

The district court delivered its oral opinion on October 22, 1987. The court reaffirmed the original over-and-under $1,000 equal protection violation. The court also found additional equal protection violations.[3] However, the court expressly declined to decide the due process constitutionality of § 9-104(a) of the Tort Immunity Act on grounds that a court should not determine constitutional issues that are not necessary to resolve the litigation before it.

The City appealed. The Collum class filed a cross appeal limited to the district court's damage award to its class. No cross appeal was filed on either the due process or equal protection issues and none of the plaintiff classes argued due process as an alternate ground for affirming the judgment.

---

[3] The additional equal protection violations were: 1) the City's chronic underbudgeting of the tort judgment fund; 2) the City's failure to pay all judgments in order of entry; 3) paying enterprise fund, contract, and employment-related judgments before paying tort judgments larger than $1,000.

In its decision, the Seventh Circuit, after applying the law-of-case doctrine, overruled *Evans I* insofar as it found an equal protection violation in the differential payment practice for tort judgments over and under $1,000. Appendix to Petition for Certiorari at 16-18. The court of appeals concluded that, in paying judgments under $1,000 before paying the larger tort judgments, the City was rationally pursuing the legitimate interest of paying promptly as many judgments as possible with the funds available. *Id.* at 17. The court expressly held that the City's differential payment of over and under $1,000 tort judgment was not discriminatory. *Id.* The Seventh Circuit also held that there was no equal protection violation with respect to any of the City's practices of paying non-tort judgments such as enterprise fund, contract, and employment-related judgments before paying tort judgments over $1,000. *Id.* at 18-20. The court of appeals did not reach the due process issue because "[t]he parties to this appeal . . . did not raise any issue of due process." *Id.* at 21 n.15.

REASON FOR DENYING THE WRIT

THE SEVENTH CIRCUIT APPLIED THE RATIONAL-RELATIONSHIP TEST AND THE DOCTRINES OF WAIVER AND LAW OF THE CASE TO THE FACTS PRESENTED CONSISTENT WITH THE DECISIONS OF THIS COURT AND OTHER CIRCUITS.

1. There Is No Conflict Between The Decision Below And The Decisions Of Other Circuits Or Of This Court Regarding The Equal Protection Implications Of The City Of Chicago's Judgment Payment Practices.

Petitioners acknowledge that there is no dispute here as to the appropriate level of scrutiny to be employed in

this case. Petition for Certiorari at 18-20. Accordingly, in an effort to generate an issue meriting this Court's review of what seems to be a fact-bound decision, petitioners argue that *Minton v. St. Bernard Parish School Bd.*, 803 F.2d 129 (5th Cir. 1986), conflicts with the decision below. Petition for Certiorari at 15-18. In *Minton*, the Fifth Circuit addressed the sufficiency of due process and equal protection allegations that a local school district refused[4] to pay tort judgments entered against it when obtained by persons residing outside the parish within which the school district was located. 803 F.2d at 130-31. The district court had dismissed the complaint for failure to state a cause of action. The Fifth Circuit affirmed the dismissal of the due process claim but reversed the dismissal of the equal protection claim, reasoning that the plaintiff should be given the opportunity to prove at trial his claim of irrational discrimination between residents and nonresidents of the school's parish. *Id.* at 133.

No conflict exists between the law in the Fifth and Seventh Circuits. Both circuits allow equal protection claims premised on alleged discrimination in paying judgment creditors to go to trial on the issue of whether the discrimination is rational. Moreover, the Seventh Circuit in *Evans II* was faced with a very different question than was the Fifth Circuit in *Minton*—did the petitioners carry their burden of proving that the discrimination was without rational justification. The discriminatory practices alleged in *Minton* involved nonpayment of tort judgments based on the residency of the judgment holder. Neither

[4] In *Minton*, there was a flat refusal by a governmental body to pay judgments entered against it and in favor of nonresident plaintiffs. In *Evans II*, the City did not refuse to pay judgments; instead, the City paid all judgments with interest.

nonpayment of tort judgments nor the judgment holders' residency are issues in this case. As the Seventh Circuit held, the City's judgment payment practices were not based on any irrational discrimination and, in fact, the City paid all of its judgments with interest.

The other cases cited by petitioner also do not assist them. *Quincy v. Jackson*, 113 U.S. 332 (1885), was in federal court by way of removal; *Canal & Claiborne Streets R.R. Co. v. Hart*, 114 U.S. 654 (1885), was in federal court under diversity jurisdiction. Both cases were brought and decided under state law. No federal constitutional question was at issue. Similarly, no federal constitutional question was presented in *United States ex rel. Kilpatrick v. Capdevielle*, 118 F. 809 (5th Cir. 1902), and *Clearwater County v. Pfeffer*, 236 F. 183 (8th Cir. 1916). *Kilpatrick* involved the question under Louisiana law of whether a municipality could be required to apply unused taxing authority to satisfy a judgment. *Clearwater County* involved the question under Minnesota law of whether a judgment against a county should be satisfied from funds under the control of the county treasurer or whether it could be satisfied by a levy on the county's bank accounts. None of these cases addresses the issue presented here.

In sum, review of this case is not warranted since there is no conflict to resolve among the courts of appeal. *See* this Court's Rule 17.1(a).

2. The Alleged Disparate Treatment In This Case Is Subject Only To Minimal Scrutiny And The Seventh Circuit Correctly Applied That Standard Of Review To The Facts Presented.

The parties agree that minimal scrutiny under the rational basis test is the appropriate standard of review in this case because the alleged disparate treatment is not

based on a suspect classification and does not implicate a fundamental right. *See San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 40 (1973); *see generally City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985). Under the rational basis test, the court examines the purpose of the challenged governmental action and the means employed to achieve the purpose; the purpose must be legitimate and the means reasonably related to securing the purpose. *See Rodriguez*, 411 U.S. at 40.

Petitioners maintain that the Seventh Circuit improperly applied the purpose prong of this test. Specifically, they argue that City cannot advance a legitimate purpose, as a matter of law, because its practice of paying tort judgments conflicts with a state statute and a local ordinance, both of which address the payment of tort judgments. *See* Petition for Certiorari at 20-21.

This Court has long held, however, that failure to follow neutral state or local law does not violate the equal protection clause absent animus or malicious intent. *See, e.g., Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886) (selective enforcement of local ordinance violates the equal protection clause only if motivated by "oppressive" intent); *accord Oyler v. Boles*, 368 U.S. 448, 456 (1962); *Snowden v. Hughes*, 321 U.S. 1, 8 (1944); *MacKay Tele. & Cable Co. v. City of Little Rock*, 250 U.S. 94, 100 (1919). No animus or malicious intent was alleged, much less proved in this case. The evidence at trial showed only that holders of judgments of less than $1,000 were paid before holders of judgments of $1,000 or more solely because of insufficient appropriations to the tort judgment fund. The evidence also showed that the differential payment was a reasonable solution to the problem of insufficient funding, because it enabled the City to pay more tort judgment holders than it would have been able to pay by any

other method. On these facts, the Seventh Circuit correctly held that the City's tort judgment payment practice was not discriminatory and did not violate the equal protection clause. Appendix to Petition for Certiorari at 17. This is the correct result under *Yick Wo* and subsequent equal protection decisions of this Court. Violation of state or local law does not, in itself, constitute "illegitimate" conduct forbidden by equal protection, contrary to petitioners' contention. Any other conclusion would federalize the bulk of state law.

In any event, the City's articulated interests of paying a larger number of creditors quickly and maintaining a workable budget process, which the court of appeals held justified its judgment payment practices, are not inherently inconsistent with § 9-104 of the Tort Immunity Act, the only statute cited by petitioners.[5] That statute requires only that judgments be paid within the fiscal year following the year in which the judgment became final or, in the case of hardship, within 10 years. *See* Ill. Rev. Stat. ch. 85, § 9-104 (1981). Nothing in the City's practice of paying smaller judgments promptly is inherently inconsistent with this statute. While the City may have failed to follow the procedures set out in the statute (a question for another case brought in state court), there is nothing about these articulated interests that is illegitimate under this statute. Thus, the question whether an articulated purpose inconsistent with state law can nevertheless be treated as legitimate for equal protection purposes is not present on these facts. Since the City's twin policies of paying promptly a larger number of tort judg-

[5] Petitioners make passing reference to "state statutes and municipal ordinances," *see e.g.*, Petition for Certiorari at 20, 21, but the only statute they specifically address is § 9-104.

ment holders and "maintaining a workable budgetary scheme," Appendix to Petition for Certiorari at 20, were legitimate (nothing in state law forbids such policies), and its payment practices were rationally related to these policies, there could be no violation of the equal protection clause.

Finally, there is no substance to the claim of the Balark and Collum petitioners that the Seventh Circuit applied a one-tiered rather than a two-tiered test in this case. Appendix to Petition for Certiorari at 19-20. Contrary to the petitioners' assertions, *id.*, the Seventh Circuit did indeed analyze both whether the City's articulated purposes were legitimate and whether the payment practices were rationally related to those purposes. The court concluded that they were. Appendix to Petition for Certiorari at 17-18 (analyzing the legitimacy of the City's interests and the rationality of its policy); 20 (same).

In short, the petitioners do not challenge in any meaningful way the basic legal principles employed by the Seventh Circuit. They challenge only the application of those principles to the facts at issue in this case. Such a fact-bound issue does not warrant review by this Court.

3. The Seventh Circuit Properly Applied The Procedural Principles Of Waiver And Law Of The Case To The Facts Presented.

Just as the Seventh Circuit correctly applied the purpose prong of rational basis scrutiny to the facts presented, it also correctly applied the doctrines of waiver and law of the case. As to waiver, the Seventh Circuit held that petitioners waived their due process claim because they did not raise it in their brief. Appendix to Petition for Certiorari at 21 n.15. This is a correct application of the law, since petitioners could have raised and

argued due process as an alternate ground for affirming the judgment of the district court. They did not, and the Seventh Circuit properly treated the issue as waived. *See Oviawe v. Immigration & Naturalization Serv.*, 853 F.2d 1428, 1431 n.5 (7th Cir. 1988) (waiver rules apply to appellees as well as to appellants).[6] Of course, an issue waived in the appellate court is not properly before this court. *See, e.g., Hoover v. Ronwin*, 466 U.S. 558, 574 n.25 (1984); *Heckler v. Campbell*, 461 U.S. 458, 468 n.12 (1983); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

In any event, this waiver issue poses no question of any real novelty and the application of the law of waiver to these particular facts hardly merits the scrutiny of this court.

Similarly, it is clearly established that the law of the case doctrine cannot be used as a shield to preserve a wrong decision. *See, e.g., Arizona v. California*, 460 U.S. 605, 618, n.8 (1983) ("Under law of the case doctrine, as now most commonly understood, it is not improper for a court to depart from a prior holding if convinced that it is clearly erroneous and would work a manifest injustice"); *Messinger v. Anderson*, 225 U.S. 436, 444 (1912)

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[6] Petitioners attempted to raise the due process issue in their petitions for rehearing and suggestion for hearing *en banc*. However, this untimely attempt to revive the issue did not cure petitioners' waiver of this issue in their respective briefs on the merits. *See, e.g., Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc.*, 776 F.2d 646, 656 n.13 (7th Cir. 1985); *United States v. Sutherland*, 428 F.2d 1152, 1158 (5th Cir. 1970); *Higa v. Transocean Airlines*, 230 F.2d 780, 786 (9th Cir. 1955). Moreover, this Court does not review an issue raised for the first time in the court of appeals on a petition for rehearing. *Hoover v. Ronwin*, 466 U.S. 558, 574 n.25 (1984).

(court of appeals erred in applying the law of the case to avoid considering the effect of an intervening state supreme court decision that correctly stated applicable law). For the reasons presented above, the decision of the *Evans I* court on the equal protection issue was wrong. It was corrected by the *Evans II* court, as required under the law of the case doctrine and any reasonable and just jurisprudence. Not only did the Seventh Circuit correctly apply the law of the case doctrine on the facts of this case, but the manner of applying this doctrine is also the type of fact-bound issue that does not warrant this Court's review.

Neither the issues relating to the scope of appellate review nor the substantive equal protection issue raised in the petition for writ of certiorari warrants review by the Court. The petition should therefore be denied.

CONCLUSION

There is no conflict between the circuits on the equal protection issue raised by petitioners. The Seventh Circuit correctly held that the equal protection clause was not violated by the City of Chicago's differential payment of its tort judgments. Further, the Seventh Circuit properly applied the law of case and waiver doctrines.

No issue is presented warranting review by this Court and, accordingly, the petition should be denied.

Respectfully submitted,

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CITY OF CHICAGO,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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No. 89-1191

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

SYLVIA EVANS, BERTHA BALARK, and CURTIS COLLUM, individually and on behalf of others similarly situated,

Petitioners,

v.

CITY OF CHICAGO,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

ARGUMENT

Petitioners file this Reply Brief in Support of their Petition for a Writ of Certiorari to call this Court's attention to a recent decision of this Court which is dispositive of petitioners' position, as well as to address the issue of waiver first raised in respondent's Brief in Opposition to Petition for Certiorari.

I. *Missouri v. Jenkins* Is Dispositive Of The Main Issue Presented In The Petition For Certiorari

Petitioners set forth in their Petition for Certiorari, as their main issue, that the chief error of the Seventh Circuit Court of Appeals was a failure to follow the dictates of this Court in examining municipal payment of debt obligations (tort or other judgments) and compelling municipalities to pay debt obligations when the taxing power was available to pay, but the municipality arbitrarily chose not to do so. Petition for Certiorari at 15-18. This Court's recent decision in *Missouri v. Jenkins*, ___ U.S. ___, 58 U.S.L.W. 4480 (4/18/90), is dispositive of the main issue presented in the Petition for a Writ of Certiorari and compels reversal of the court of appeals' decision.[1]

A. In *Evans II* The Court Of Appeals Refused To Interfere With Municipal Debt Payment and Local Taxation And Relaxed The Equal Protection Analysis

The *Evans II* court of appeals' refusal to interfere with municipal payment practices and taxation to formulate a remedy for the respondent's irrational system of payment resulted in the application of a lenient and deferential

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[1] Alternatively, this Court should vacate the opinion of the court of appeals and remand for reconsideration in light of *Jenkins*.

equal protection analysis, deviating significantly from the standard test applied by this Court. *See* Petition for Certiorari at 17. This refusal is evidenced by the *Evans II* court's description of the City's payment practice, the court's examination of *Evans I* and its examination of the *Evans II* trial proceedings. *See*, respectively, Appendix to Petition for Certiorari at 7 ("The delay in paying tort judgments stemmed from the City's practice of levying a special property tax each year to pay judgments at an amount that was far less than needed to pay the annual tally of judgments. The City refused to apply any other revenue to the payment of tort judgments."); *Id.* at 17-18 ("At worst, the City is merely attempting to satisfy as many individual claimants as possible with the limited revenues available.") and *Id.* at 20-21 ("It is not this court's province to prescribe the budgetary workings of the City of Chicago. . . . This court must avoid attempting to determine for itself whether the City is able to raise more revenue. . . . **The City's alleged failure to raise adequate revenue to quickly meet all its tort obligations does not violate equal protection.**" (emphasis supplied)).[2]

B. In *Missouri v. Jenkins* This Court Unanimously Determined That Federal Courts Are Empowered To Order Local Authorities To Exercise Taxation Powers

In *Jenkins* the majority determined that federal courts have the power to intervene and direct local governmental

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[2] The only statutory limitation on the City of Chicago's ability to raise sufficient revenue to meet its tort judgment obligations was held unconstitutional by the *Evans I* district court and affirmed by the *Evans I* court of appeals. Appendix to Petition for Certiorari at 68 n.16 & 69. The unconstitutionality of this statute was not resurrected and challenged by the City of Chicago in *Evans II*.

bodies to levy taxes. *Id.* at 4486, relying upon *Griffin v. Prince Edward County School Board*, 377 U.S. 218, 233 (1964). The dissent (per Justice Kennedy) agreed with the majority's reading of *Griffin*, to the extent it allows federal courts to order local authorities "to exercise **existing** authority to tax." 58 U.S.L.W. at 4490 (emphasis original). This Court's unanimous determination in *Jenkins*, that federal courts have the power to intervene and direct local governmental bodies to levy taxes which they are authorized but unwilling to do, compels reversal of the court of appeals' decision. *See* note 1, *supra*.

The *Jenkins* majority also relied on several earlier cases where this Court approved the issuance of a writ of mandamus compelling local governmental bodies to levy taxes to satisfy debt obligations, mostly in the form of contracts. *See* cases cited in 58 U.S.L.W. at 4486. This Court further held that federal courts have the power to set aside state imposed limitations on local taxing authority. *Id.* This holding relied in particular on *Von Hoffman v. City of Quincy*, 4 Wall. 535 (1867), where a bondholder obtained a writ of mandamus to compel the city to levy taxes to pay outstanding interest coupons.

In *Jenkins* this Court specifically followed these decisions, many of which based their Constitutional authority upon the Contracts Clause (Article I, section 10, clause 1), in the context of a Fourteenth Amendment equal protection challenge to the Kansas City School District's failure to pay its share of the costs of desegregating the area schools. The Equal Protection Clause of the Fourteenth Amendment is precisely the basis for petitioners' cause. *See* Petition for Certiorari at 1, Question Presented No. 1 & at 17-18.

This Court has long since disapproved of deference accorded to unreasonable municipal plans for payment of debt obligations[3] and *Jenkins* reaffirms that precept.[4] Indeed, in addition to the authority cited by petitioners, Petition for Certiorari at 16-17, the authority relied upon in *Jenkins* doubly supports petitioners' position. This Court's decisions evidence that contracts and debt obligations/judgments (often one in the same when a contract debt is reduced to judgment in an action) are treated similarly when enforcement is sought. See *Wolff v. New Orleans*, 103 U.S. 358 (1881) and *United States v. New Orleans*, 98 U.S. 381 (1879).

The same authority cited by this Court in *Jenkins* mandates relief for petitioners. Specifically several decisions reject arbitrary municipal payment determinations, which is the cornerstone of petitioners' cause. *Von Hoffman v. City of Quincy*, 4 Wall. 535, 552 (1879) ("Nothing can be more material to the obligation than the means of enforcement. Without the remedy the contract may, indeed, in the sense of the law, be said not to exist, and its obliga-

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[3] In *City of Galenia v. Amy*, 5 Wall. 705, 710 (1867), this Court stated:

> The counsel for the plaintiffs in error has called our attention, with emphasis and eloquence, to the diminished resources of the city, and the disproportionate magnitude of its debt. Much as personally we may regret such a state of things, we can give no weight to considerations of this character, when placed in the scale as a counterpoise to the contract, the law, the legal rights of the creditor, and our duty to enforce them.

[4] This deference creates the conflict between *Evans II* and *Minton v. St. Bernard Parish School Board*, 803 F.2d 129 (5th Cir. 1986). Petition for Certiorari at 18. If the cases were consistent, as respondent asserts, Brief in Opposition to Petition for Certiorari at 5, then the equal protection claim in *Minton* would have been dismissed as well.

tion to fall within the class of those moral and social duties which depend for their fulfilment (sic) wholly upon **the will of the individual**." (emphasis supplied)); *Board of Commissioners of Knox County v. Aspinwall*, 24 How. 376, 385 (1861) ("The fund to pay this judgment, by the face of the contract, is a special tax laid and to be collected by defendants. They refuse to perform a plain duty."); and *Wolff v. New Orleans*, 103 U.S. 358, 363-64 (1881) (Court rejected the city's clearly arbitrary proposed method of payment of bond debts "to be determined by chance in the drawing of a lottery . . . under this arrangement, whether a creditor will be paid in one or in fifty years, will depend upon the turn of a wheel and the drawing of a lucky number").

The court of appeals ignored the dictates of this Court's determinations in allowing obviously arbitrary and irrational payment practices to survive minimal, deferential scrutiny. The court of appeals' decision was primarily motivated by its refusal to recognize the remedy of court ordered intervention in municipal payment practices and local taxation, as *Missouri v. Jenkins* permits.

II. Logic And Law Compel That Petitioners' Due Process Claim Was Not Waived

Respondent asserts that petitioners waived consideration of the due process question because it was not raised in the court of appeals as an alternate grounds for affirmance of the district court. Brief in Opposition to Petition for Certiorari at 9-10. This suggestion stretches both irony and logic beyond acceptable bounds. The irony is found in the juxtaposition of the *Evans I* court of appeals' specific finding that the very same due process question should not be addressed because the district court had not reached the issue (Appendix to Petition for Certiorari

at 44; Brief in Opposition to Petition for Certiorari at 2 n.2) and the *Evans II* court of appeals' summary disposition of the matter. *See e.g. Dandridge v. Williams*, 397 U.S. 471, 475 n.6 (1970) ("When attention has been focused on other issues, or when the court from which a case comes has expressed no views on a controlling question, it may be appropriate to remand the case rather than deal with the merits of that question in this Court.")

It is illogical, as respondent suggests, that the court of appeals address (let alone affirm based upon) issues not reached initially because of lack of lower court findings and secondly where the district court avoided an unnecessary constitutional determination.[5] The court of appeals already notified counsel very clearly that it would not reach the due process question without a lower court ruling. Appendix to Petition for Certiorari at 54. This decision in *Evans I* was correct because both logic and law dictate that such issues of state law and mixed issues of fact and law be remanded to the lower court for full consideration. *Cf. Patsy v. Board of Regents of the State of Florida*, 457 U.S. 496, 515 n.19 (1982) (although Eleventh Amendment issue not raised in lower courts, if raised it should be determined first by district court because of issues of state law). Respondent seeks to penalize petitioners for the inconsistency of the court of appeals. Brief in Opposition to Petition for Certiorari at 10. Finally, the authority cited by respondent to support this proposition are primarily cases where the issue was not first raised in the district court.

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[5] Respondent's contemplation of appellate practice appears to include a multitude of otherwise unnecessary footnotes and brief sections on issues not addressed by the lower court. Once the *Evans I* court of appeals determined that petitioners' due process claim should be first decided in the district court, raising the issue again on the second appeal could have resulted in sanctions.

CONCLUSION

The petition for writ of certiorari should be granted, the decision of the court of appeals should be reversed in light of this Court's opinion in *Missouri v. Jenkins* and the cause remanded. *See* note 1, *supra*.

Respectfully submitted,

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May, 1990